MOTION FILED

FEB 20 1997

(24)

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, Attorney General
of the United States, et al., ***Appellants***

v.

AMERICAN CIVIL LIBERTIES UNION, et al., ***Appellees***

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE AN OUT OF TIME AMICUS CURIAE BRIEF UNDER RULE 37(3)(b) WITH ATTACHED BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES

JAMES J. CLANCY*
CAROL A. CLANCY
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352
(818) 352-2069
FAX: (818) 352-6549
*Counsel of Record for Amicus Curiae

February 17, 1997

---

187 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, Attorney General
of the United States, et al., ***Appellants***

v.

AMERICAN CIVIL LIBERTIES UNION, et al., ***Appellees***

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE AN OUT OF TIME AMICUS CURIAE BRIEF UNDER RULE 37(3)(b) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES, UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES.

Now comes James J. Clancy, attorney at law and a member of the Supreme Court Bar, to move this Court for leave to file an out of time Brief Amicus Curiae, suggesting a reversal of the judgment for Plaintiff A.C.L.U., et al. below, upon the authority of *Ralph Ginzburg, et al. v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21,1966) and Judge Learned Hand's "variable obscenity" principles. This motion is made necessary for the purpose of bringing to the attention of the Court relevant matter not already brought to its attention by the

parties, and is necessary because neither the Solicitor General's Brief, nor the Brief of Amici Curiae have discussed ***Ginzburg v. U.S.***, supra, which in moving party's judgment, should control the disposition of this appeal.

My filing of a timely Amicus Curiae Brief was virtually impossible under **Rule 37**, in that the earliest "date certain" that such deficiency could be discovered was the date such briefs were "published" (filed) and thereafter "examined" for content. Under these circumstances, any brief explaining the defect would be tardy.

The background facts in support of this motion are set forth hereinafter:

On or about February 3, 1997, I received a complementary copy of the Brief Amici Curiae filed on or about January 20, 1997 for certain Members of Congress in ***Reno, Attorney General of the United States, et al. v. A.C.L.U., et al.***, No. 96-511, in Support of Appellants. In my judgment, this brief was uniformly outstanding, except that it did not discuss the impact of ***Ginzburg, et al. v. U.S.***, supra, and the federal "pandering" obscenity crime (which this Court upheld in the ***Ginzburg*** decision and, by its very nature, requires a reversal of the judgment below which upheld the facial attack).

Thereafter, I took steps to obtain a copy of the Solicitor General's Brief for Appellants and undertook a study of both briefs. My examination disclosed that neither brief had analyzed or considered the impact of this Court's opinion in ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21, 1966) (interpreting **18 U.S.C. §1461**).

Ginzburg et al v. U.S., supra, materially changed the law of obscenity, by confirming the existence of **two**

types of federal obscenity crimes: **one** that regulated "obscenity in the abstract" (obscenity vel non) and did not require a "scienter" mens rea, other than "knowledge of the contents", ***Rosen v. U.S.***, 161 U.S. 606 (1896), and **the other**, described as "variable obscenity" and "pandering" obscenity which focused on the "scienter" mens rea aspect, and did not require proof that the subject matter was "obscenity in the abstract" (obscenity vel non). An explanation of this latter development, in relation to the appeal of Ralph Ginzburg, is discussed hereinafter in the attached Brief Amicus Curiae under the topic "Interest of Amicus Curiae, James J. Clancy".

In recent years, legal scholars have inordinately focused upon the federal crime of "obscenity in the abstract" (to the exclusion of the "pandering" obscenity crime), and today urge this Court to solve the problem by enunciating a new "hard-core pornography" standard (see Brief Amici Curiae for Member of Congress at page 13, footnotes 15 and 16).

This habitual focus of the federal judiciary and federal bar on the federal obscenity crime as a crime involving "obscenity vel non" has resulted in a neglect and failure to consider and analyze the impact of the ***Ginzburg*** "variable pandering" obscenity crime on the pleading requirements of the **Communications Decency Act of 1996.**

Because of my personal involvement in Ginzburg's appeal (see "Interest of Amicus Curiae, James J. Clancy" at **page 2-5**) and my knowledge of its constitutional import and potential contemporary impact, I considered it to be my duty as a member of this Court's Bar to move the Court for leave to file this "out of time" amicus curiae brief in support of a reversal of the judgment for Appellants A.C.L.U., et al., upon the authority of Justice Brennan's majority decision in ***Ginzburg, et al. v. U.S.***, supra, and

Judge Learned Hand's "variable obscenity" principles which are still the law today.

Rule 37(3)(a) requires that an Amicus Curiae Brief in Support of Neither Party should be filed with the Brief for the Appellants. One would reasonably expect that the "pandering" crime impact of ***Ginzburg, et al. v. U.S.***, supra, would be treated by either the Solicitor General or one of the supporting amicus curiae briefs. A defect of this nature will not be ascertainable until a "date certain" (as in this case) after the Brief for Appellants has been filed and after the interested parties have had an opportunity to examine the same, which "date certain" upon ascertainment is then, by its very nature, "tardy" under **Rule 37(3)(a)**. This rule, as applied to these facts, is unreasonable and should not defeat this Motion.

In the past, this Court has allowed an out of time brief to be filed under similar circumstances. See Motion of James J. Clancy for Leave to File a Brief Amicus Curiae Out of Time in ***Barnes v. Glen Theatre, et al.***, in the Supreme Court of the United States, October Term, 1990, No. 90-26. On January 7, 1991, this Court entered an order in ***Barnes v. Glen Theatre, et al.***, at 498 U.S. 1021, reading, "The motion of James J. Clancy for leave to file a brief (our of time) as Amicus Curiae is Granted." A copy of that Amicus Curiae Brief is being lodged with the Clerk of this Court.

A copy of Moving Party's four page letter of request for consent with 8 pages of attachments, pursuant to **Rule 37(3)** was faxed to the Appellees on Wednesday, February 12, 1997 (see copy of letter at **Appendix 1** herein). The last paragraph on page 4 reads:

> " A motion to file an out of time brief amicus curiae under **U.S. Supreme Court Rule 37(3)(c)** with brief attached and the reasons for granting the same will be filed some time during the week of

> February 9-13, approximately a week in advance of the date upon which Appellee A.C.L.U.'s reply brief will be due (February 20, 1997). The amicus curiae brief (in support of neither party) will be limited to the above argument, which is framed in this letter, i.e., the suggestion that the judgment below should be reversed upon the principle of law ("variable obscenity" standard) applied in ***Ginzburg v. U.S.***, supra, which is not discussed in the Brief for the Appellants or the Amicus Curiae Brief of the National Law Center for Children and Families (which were due on or about January 20, 1997. (My emphasis.)"

On the following day, Thursday, February 13, 1997, both Appellees responded with a fax letter refusing to grant their consent, which refusal was 8 days before their Reply Brief was due (a copy of Appellees' refusal to consent appears herein at **Appendix 2** and the originals are being filed with the Clerk of this Court.).

A substantive Rule of Law of the magnitude of Judge Learned Hand's (father of the federal obscenity law) "variable obscenity" principles should not be so easily avoided by a mere procedural rule of the nature of **Rule 37(3)(a)**. For all the above reasons, Moving Party's motion for leave to file a Brief Amicus Curiae out of time should be granted.

Dated: February 17, 1997

Respectfully submitted,

James J. Clancy
Counsel for Moving Party.

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, Attorney General
of the United States, et al., ***Appellants***

v.

AMERICAN CIVIL LIBERTIES UNION, et al., ***Appellees***

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES

JAMES J. CLANCY*
CAROL A. CLANCY
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352
(818) 352-2069
FAX: (818) 352-6549
*Counsel of Record for Amicus Curiae

February 17, 1997

TABLE OF CONTENTS

	PAGE
INTEREST OF AMICUS CURIAE	2
I. BACKGROUND TO THIS COURT'S DECISION IN ***RALPH GINZBURG v. U.S.***	2
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	6
ARGUMENT	6
CONCLUSION	22
APPENDIX 1: [COPY OF ATTORNEY JAMES J. CLANCY'S 4 PAGE LETTER OF REQUEST FOR CONSENT TO FILE AN AMICUS CURIAE BRIEF, WITH 8 PAGES OF ATTACHMENTS IN ***RENO V. A.C.L.U., ET AL.*** U.S. SUPREME COURT NO. 96-511, FAXED TO APPELLANTS ON FEBRUARY 12, 1997.]	1-1 TO 1-7
APPENDIX 2: [COPY OF APPELLEE A.C.L.U. AND APPELLEE A.L.A. FAX LETTERS, DATED FEBRUARY 13, 1997 IN WHICH APPELLEES A.C.L.U. AND A.L.A. REFUSE TO GRANT THEIR CONSENT TO THE FILING OF A BRIEF AMICUS CURIAE BY JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN ***RENO V. A.C.L.U., ET AL.*** U.S. SUPREME COURT NO. 96-511.]	2-1 TO 2-2
APPENDIX 3: [COPY OF LIST OF 56 CASES IN WHICH AMICUS CURIAE JAMES CLANCY HAS FILED AMICUS CURIAE AND APPELLATE BRIEFS IN THIS COURT IN OBSCENITY LITIGATION DURING 1963-1990.]	3-1 TO 3-7

TABLE OF CONTENTS

PAGE

APPENDIX 4: [COPY OF BRIEF AMICUS CURIAE OF CITIZENS FOR DECENT LITERATURE, INC., IN ***RALPH GINZBURG, ET AL. V. U.S.***, FILED IN SUPPORT OF RESPONDENT UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.] 1 TO 77 AND 1 TO 24

APPENDIX 5: [COPY OF REPLY BRIEF OF AMICUS CURIAE CITIZENS FOR DECENT LITERATURE, INC., IN ***RALPH GINZBURG, ET AL. V. U.S.***, FILED IN SUPPORT OF RESPONDENT, UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.] 1 TO 7

TABLE OF AUTHORITIES

CASES

Burstein v. U.S.,
178 F.2d 665 (9th Cir., 1949) 3

Dombrowski v. Pfister,
380 U.S. 479 (1965) 8, 15

Ginzburg v. U.S.,
383 U.S. 463 (1966) 1-11, 20-25

Miller v. California,
413 U.S. 15 (1973) 24

Rosen v. U.S.,
161 U.S. 606 (1896) 3, 7, 24, 25

CASES (cont.)

PAGE

Roth v. U.S.,
354 U.S. 476 (1957) 7, 15, 22, 23

Shea v. Reno,
930 F.Supp. 916 (U.S.D.C., S.D.N.Y., 1996) 21

U.S. v. Levine,
83 F.2d 156 (2nd Cir., 1936) 1, 3, 6, 22, 23

U.S. v. One Book Entitled Ulysses,
73 F.2d 105 (2nd Cir., 1934) 2

U.S. v. Rebhuhn,
109 F.2d 512 (2nd Cir., 1946) 1, 3-6, 11-19, 22

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

United States Constitution:
- First Amendment 6
- Tenth Amendment 25
- Eleventh Amendment 25

FEDERAL RULES

United States Supreme Court Rules:
- Rule 37(3)(a) 4

FEDERAL STATUTES

	PAGES
The Communications Decency Act of 1996	5, 6, 8, 10, 11, 19, 22
18 U.S.C., Section 1461	6, 8

TEXTS

Schwartz, "Morals Offenses and the Model Penal Code," 63 Col.L.Rev. 669 (1963)	15, 22
Proposed Official Draft of the A.L.I. Model Penal Code	10, 11, 15, 22
U.S. News and World Report, February 10, 1997	26

No. 96-511

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

JANET RENO, Attorney General
of the United States, et al., ***Appellants***

v.

AMERICAN CIVIL LIBERTIES UNION, et al., ***Appellees***

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF AMICUS CURIAE OF JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) SUGGESTING REVERSAL OF THE JUDGMENT FOR A.C.L.U, ET AL., APPELLEES UPON THE AUTHORITY OF *RALPH GINZBURG v. U.S.*, 383 U.S. 463 (1966) AND JUDGE LEARNED HAND'S "VARIABLE OBSCENITY" PRINCIPLES.

This Amicus Curiae Brief in Support of neither Appellants nor Appellees is being filed pursuant to **Rule 37(3)(b)**, and suggests a reversal of the judgment for Appellees, A.C.L.U., et al., upon the authority of ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 536, 86 S.Ct. 942; rehearing denied, 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440 (March 21, 1966) and the "variable obscenity" principles established by Judge Learned Hand in ***U.S. v. Levine***, 83 F.2d 156 (2nd Cir., 1936) and ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 (2nd Cir., 1946), certiorari

denied in 310 U.S. 629, 84 L.Ed. 1899, 60 S.Ct. 971. Written consent of the parties was requested by fax on February 12, 1997, see **Appendix 1**. On February 13, 1997, both Appellee A.C.L.U. and Appellee A.L.A. refused consent by fax letter. See copy of letters at **Appendix 2**, herein.

INTEREST OF AMICUS CURIAE

Amicus Curiae James J. Clancy is a Los Angeles Attorney admitted to practice in this Court in 1962. Since that time, Attorney Clancy has filed a number of Amicus Curiae and appellate briefs in this Court in obscenity litigation. A list of 56 of these cases filed during the 27 year period from 1963-1990 is set forth at **Appendix 3** herein. One of these cases was the landmark case of ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463 (1966).

I. BACKGROUND TO THIS COURT'S DECISION IN *RALPH GINZBURG v. U.S.*

In his 1936 decision in ***U.S v. Levine***, 83 F.2d 156 (2nd Cir., 1936), Judge Learned Hand introduced the concept of "variable obscenity" which, in conjunction with his 1934 decision in ***U.S. v. One Book Entitled Ulysses***, 73 F.2d 105 (2nd Cir., 1934), had the effect of changing the federal law on obscenity. In ***U.S. v. Levine***, supra, Judge Learned Hand (often regarded as the "father" of the modern obscenity statutes) explained the legal theory of "variable obscenity" as follows:

> ". . . Obscenity is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc,

> like the standard of care. . ."
>
> " The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader's hands; of this the jury is the arbiter." (Our emphasis).

Both the 1934 civil decision (injunction) in ***Ulysses***, supra, and the obscenity crime (see ***Rosen v. U.S.***, 161 U.S. 29 [1896] which required only a subjective "knowledge of the contents") involved "obscenity in the abstract" (obscenity vel non).

During the period 1936-1966, the "practice" in the lower federal courts began to develop a new obscenity crime— the so called "pandering" obscenity crime which did not require proof of obscenity in the abstract (obscenity vel non) and, instead, required a mens rea (scienter) requirement which became known as "pandering" obscenity. See ***U.S. v. Levine***, 83 F.2d 156 (2nd Cir., 1936); ***Burstein v. U.S.***, 178 F.2d 665 (9th Cir., 1949); ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 (2nd Cir., 1940), certiorari denied 310 U.S. 629, 84 L.Ed. 1899, 60 S.Ct. 971.

In the ***Ralph Ginzburg v. U.S.***, supra, litigation, the U.S. Attorney in the trial court had tried his case upon the "pandering" concept and the record on appeal reflected that fact.

In his Brief for the Respondent on appeal, the Solicitor General did not argue the "variable" obscenity "pandering" concept, and instead, focused upon the "obscenity in the abstract" (obscene vel non) and "redeeming social importance" concepts.

In November of 1965, Moving Party herein (Attorney James J. Clancy) appeared in this Court in ***Ralph Ginzburg v. U.S.***, No. 42 and filed a 77 page Brief Amicus

Curiae as Counsel of Record for Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation in support of the Respondent United States of America and, as an Amicus Curiae, argued the variable obscenity "pandering" concept upon which the case had been tried. See copy of Brief Amicus Curiae of Citizens for Decent Literature, Inc., at **Appendix 4** herein at pages 61-62, 66-68 and 69-77.

In his Reply Brief, Appellant Ralph Ginzburg referred to the Solicitor General's Response Brief as having conceded the fact that the subject matter was not obscene. When the Solicitor General did not reply to Ginzburg's claim of a "concession", Attorney James J. Clancy as Counsel of Record for Amicus Curiae Citizens for Decent Literature, Inc. prepared a reply brief, carried the same to Washington, D.C. on the day before oral argument in ***Ralph Ginzburg v. U.S.***, supra, had it printed by Byron S. Adams, Washington, D.C. as a Reply Brief and filed the same with the Clerk of the U.S. Supreme Court on the day of oral argument in the ***Ginzburg*** 1966 case. The Clerk of this Court received and filed the same before oral argument in the ***Ginzburg*** case (in 1966, there was no Rule of Court or decision of this Court which precluded the filing of a Reply Brief by an Amicus Curiae. Compare in this regard, **Rule 37(3)(a)** of the 1995 Revised Rules of the U.S. Supreme Court which precludes the filing of a Reply Brief by an Amicus Curiae). A copy of Attorney Clancy's Reply Brief in ***Ginzburg*** is attached as **Appendix 5** herein.

In responding to Ginzburg's Reply Brief (which claimed a concession by the Solicitor General), the Citizens for Decent Literature, Inc. Amicus Curiae Reply Brief at page 4 footnote 9, cited ***U.S. v. Rebhuhn***, supra, as a "pandering" case which had been tried under the "pandering" concept, and in which a petition for writ of

certiorari had been filed in this Court and denied by this Court.

Associate Justice Brennan's Majority Opinion for this Court in the 1966 ***Ginzburg*** decision relied upon the ***U.S. v Rebhuhn***, supra, (certiorari denied) decision and thus upheld on the "merits" (for the first time) the "pandering" obscenity crime. Although the decision was 5-4, one could construe it as a 6-3 decision, in as much as Justice Harlan's separate decision indicated that he would have voted with Justice Brennan and the majority, had the majority agreed to return the case to the trial court for a retrial under the (new) "pandering" concept. See ***Ralph Ginzburg v. U.S.***, 383 U.S. 495-496. The conclusion that must be drawn from Justice Harlan's remarks at pages 495-497 is that the word "obscene"(or "lewd" or "lascivious" or "indecent" or "filthy" or "vile"), used in a statutory scheme, is not susceptible to a facial attack where it is clear that the term is used with regard to "pandering" and equivalent anti-social conduct to satisfy the "mens rea" element of the statute.

Moving Party contends that, although the "pandering" concept and "pandering" crime had been subject to attack: (1) when Ginzburg was tried , and (2) on appeal in the U.S. Supreme Court prior to this Court's decision on March 21, 1966 in ***Ginzburg*** (upon the theory that this Court's "certiorari denied" decision in ***U.S. v. Rebhuhn***, supra, was not precedent and this Court had not, as yet, passed upon that concept); nevertheless, upon the filing of the 1966 ***Ginzburg*** decision which upheld Ginzburg's conviction on that theory, the "pandering" concept became the law of the land. The jurisdictional questions in this appeal (No. 96-511) which are limited to a facial attack on the new legislation, therefore must be examined in the light of the ***Ginzburg*** "variable obscenity" decision.

STATEMENT OF THE CASE

The four jurisdictional questions in the Jurisdictional Statement in ***Reno v. A.C.L.U.***, No. 96-511 present a narrow issue as to whether each of the sections of the **"Communication Decency Act of 1996"** ("C.D.A.") which is under attack, "is unconstitutional on its face". The three Judge U.S. District Court below upheld the challenge of the A.C.L.U. on that narrow ground and granted a preliminary injunction.

SUMMARY OF ARGUMENT

The suggestion that: ". . . this speech at issue, whether denominated 'indecent' or 'patently offensive' is entitled to constitutional protection. . .", see ***A.C.L.U. v. Reno***, 929 F.Supp. 824 at 851 (1996), is clearly erroneous. There is no unrestricted **First Amendment** Constitutional Right to use "indecent speech" or "talk dirty" or "pander to the prurient interest" or engage in anti social conduct which "constitutes an appeal to the prurient interest". See ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463 (1966).

This Court's 5-4 majority decision in ***Ralph Ginzburg, et al. v. U.S.***, supra, established Judge Learned Hand's bifurcated view of the federal obscenity law (**18 U.S.C. §1461**) in ***U.S. v. Levine***, supra, and ***U.S. v. Rebhuhn***, supra, as a correct interpretation of the federal law on "obscenity". Accordingly, it is now the Law of the Land.

The statutory sections of the **Communications Decency Act of 1996** under attack do not "ban" anything: they are criminal statutes which are designed to be applied

to anti social "conduct" which Congress has declared to be unlawful with respect to (1) the conduct of the citizens of the United States with respect to "obscenity" in their use of the "global internet", and (2) the duties and obligations of the United States as a signatory member of the International Treaty which proscribes "obscenity". See ***Roth v. U.S.***, 354 U.S. 476, 485 at footnote 15. The criminal sanctions are to be applied to the facts **after** the unlawful conduct has been engaged in.

In a criminal case involving "obscenity in the abstract" (obscenity vel non), the fact finder focuses on the definition of "obscene" and the subject matter, and determines that it is or is not obscene under all circumstances and then, if determined to be obscene in the abstract, finds the defendant to be guilty if the fact finder determines that the defendant had knowledge of what the subject matter contained, i.e., the contents of the subject matter. One of the tests to be applied in determining obscenity vel non is: "whether all reasonable persons would agree and conclude that the subject matter is "obscene in the abstract" as that term is defined by law". ***Rosen v. U.S.***, 161 U.S. 606 (1896). In a criminal case involving "variable obscenity", the fact finder does not focus exclusively upon the definition of "obscene", but rather upon the conduct of the defendant and all the surrounding circumstances and then returns a verdict of guilty if the defendant's conduct in relation to the subject matter constituted "pandering obscenity" as defined by the Court. By its very nature, a complaint charging "pandering obscenity" is not subject to a facial attack on the definition of "obscene" because the complaint can be constitutionally applied to "pandering to the prurient interest" conduct (a specific set of facts, which establish the "mens rea" and unlawful conduct), ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 474, at footnote 19.

ARGUMENT

The ***Reno v. A.C.L.U.*** trial court was in error and should have held that, under the "variable obscenity" principles approved by the U.S. Supreme Court in ***Ginzburg, et al. v. U.S.***, supra, the terms "obscene", "indecent", "patently offensive as measured by community standards", and "sexual or excretory activities or organs", as used in the **Communications Decency Act of 1996** are not subject to attack under ***Dombrowski v. Pfister***, 380 U.S. 479 (see ***Ginzburg***, supra , at pages 40 and 41, footnote 19):

> "19. One who advertises and sells a work on the basis of its prurient appeal is not threatened by the perhaps inherent residual vagueness of the **Roth** test, cf. ***Dombrowski v Pfister***, 380 U.S. 479, 486-487, 491-492, 14 L ed 2d 22, 28, 31, 85 S.Ct. 1116; such behavior is central to the objectives of criminal obscenity laws. A.L.I. Model Penal Code, Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17; Comments to the Proposed Official Draft §251.4, supra; Schwartz, Morals Offenses and the Model Penal Code, 63 Col.L.Rev. 669, 677-681 (1963); Paul & Schwartz, Federal Censorship--Obscenity in the Mail, 212-219 (1961); see ***Mishkin v New York***, 383 US 502 at 507, note 5, 16 L.Ed 2d 56, at 61, 86 S.Ct. 958."

See also Justice Harlan's dissent at pages 495-497, wherein he discusses what the government's burden of proof would be as to the terms "obscene", etc., as used in **18 U.S.C. §1461**, if the case were to be retried in the U.S. District Court under a "pandering variable obscenity"

theory (in which event, his vote would have given ***Ginzburg*** a majority vote of 6-3):

> " If there is anything to this new pandering dimension to the mailing statute, the Court should return the case for a new trial, for petitioners are at least entitled to a day in court on the question on which their guilt has ultimately come to depend. Compare the action of the Court in ***Memoirs v Massachusetts***, 383 U.S. 413, 16 L Ed 2d 1, 86 S.Ct 975, where the Court affords the State an opportunity to prove in a subsequent prosecution that an accused purveyor of Fanny Hill in fact used pandering methods to secure distribution of the book."
>
> " If a new trial were given in the present case, as I read the Court's opinion, the burden would be on the Government to show that the motives of the defendants were to pander to 'the widespread weakness for titillation by pornography' (ante, p. 38). I suppose that an analysis of the type of individuals receiving Eros and the Handbook would be relevant. If they were ordinary people, interested in purchasing Eros or the Handbook for one of a dozen personal reasons, this might be some evidence of pandering to the general public. On the other hand, as the Court suggests, the defendants could exonerate themselves by showing that they sent these works only or perhaps primarily (no standards are set) to psychiatrists and other serious-minded professional people. Also relevant would apparently be the nature of the mailer's advertisements or representations. Conceivably someone mailing to the public selective portions of

a recognized classic with the avowed purpose of titillation would run the risk of conviction for mailing non-mailable matter. Presumably the Post Office under this theory might once again attempt to ban Lady Chatterley's Lover, which a lower court found not bannable in 1960 by an abstract application of Roth. ***Grove Press, Inc. v Christenberry***, 276 F.2d 433. I would suppose that if the Government could show that Grove Press is pandering to people who are interested in the book's sexual passages and not in D. H. Lawrence's social theories or literary technique §1461 could properly be invoked. Even the well-known opinions of Judge A. N. Hand in ***United States v One Book Entitled Ulysses***, 72 F2d 705, and of Judge Woolsey in the District Court, 5 F.Supp. 182, might be rendered nugatory if a mailer of Ulysses is found to be titillating readers with its 'coarse, blasphemous, and obscene' portions, 72 F.2d, at 707, rather than piloting them through the intricacies of Joyce's stream of consciousness."

Each of the challenged sections in such act is susceptible of a constitutional construction, in that such sections of the **Communications Decency Act of 1996** do nothing more than proscribe a type of anti social "conduct" under federal "variable obscenity" standards which is of the same nature as that under which Ralph Ginzburg was indicted, convicted and sentenced to a five year jail term, see ***Ginzburg***, supra at page 39 and footnote 14 and 15, citing the **Proposed Official Draft of the A.L.I. Model Penal Code**:

"14. The Proposed Official Draft of the A.L.I. Model Penal Code likewise recognizes the question of pandering as relevant to the obscenity issue, §251.4(4); Tentative Draft No. 6 (May 6, 1957), pp. 1-3, 13-17, 46-46, 53; Schwartz, supra, n. 12; see Craig, Suppressed Books, 195-206 (1963). Compare ***Grove Press, Inc. v. Christenberry***, 176 F.Supp. 488, 496-497 (D.C.S.D., N.Y. 1959), affd. 276 F.2d 433 (C.A., 2nd Cir., 1960); ***United States v One Book Entitled Ulysses***, 72 F.2d 705, 707 (C.A., 2nd Cir., 1934), affirming 5 F.Supp. 182 (D.C.S.D., N.Y. 1933). See also The Trial of Lady Chatterly-- Regina v Penguin Books, Ltd. (Rolph ed. 1961).

"15. Our conclusion is consistent with the statutory scheme. Although §1461, in referring to 'obscene . . . matter' may appear to deal with the qualities of material in the abstract, it is settled that the mode of distribution may be a significant part in the determination of the obscenity of the material involved. ***United States v Rebhuhn***, supra. Because the statute creates a criminal remedy, cf. ***Manual Enterprises v Day***, 370 U.S. 478, 495, 8 L.Ed.2d 639, 651, 82 S.Ct. 1432 (opinion of Brennan, J.), it readily admits such an interpretation, compare ***United States v 31 Photographs, etc.***, 156 F.Supp. 350 (D.C.S.D., N.Y. 1957)."

The "variable obscenity" factors set forth in the **Communications Decency Act of 1996** are the functional equivalent of the "variable obscenity" factors discussed and applied in ***Ginzburg***, supra. See ***U.S. v. Rebhuhn***,109 F.2d 512, certiorari denied 310 U.S. 629, 84 L.Ed 1399, 60

S.Ct. 976, relied upon in ***Ginzburg***, supra, at pages 472-474, reading as follows:

> " The decision in ***United States v Rebhuhn***, 109 F.2d 512, is persuasive authority for our conclusion.14/. That was a prosecution under the predecessor to §1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . .' 109 F.2d, at 514. But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime.' Id., at 515. Speaking for the Court in affirming the conviction, Judge Learned Hand said:
>
> '. . . [T]he works themselves had a place, though a limited one, in anthropology and in psychotherapy. They might also have been lawfully sold to laymen who wished seriously to study the sexual practices of savage or barbarous peoples, or sexual aberrations; in other words, most of them were not obscene per se. In several decisions we have held that the statute does

> not in all circumstances forbid the dissemination of such publications. . . : However, in the case at bar, the prosecution succeeded . . . when it showed that the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limit; the circulars were no more than appeals to the salaciously disposed, and no [fact finder] could have failed to pierce the fragile screen, set up to cover that purpose.' 109 F2d, at 514-515."

" We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test.15/ No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.16/ Rather, the fact that each of these publications was created or exploited entirely on the

basis of its appeal to prurient interests 17/ strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.18/ A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use. Nor should it inhibit the enterprise of others seeking through serious endeavor to advance human knowledge or understanding in science, literature, or art. All that will have been determined is that questionable publications are obscene in a context which brands them as obscene as that term is defined in Roth-- a use inconsistent with any claim to the shelter of the First Amendment.19/. 'The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting.' ***Roth v United States***, 354 U.S., at 495, 1 L.Ed 2d at 1513. (Warren, C. J., concurring.)"

" It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged. Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."

" Petitioners raise several procedural objections,

principally directed to the findings which accompanied the trial court's memorandum opinion, Fed. Rules Crim. Proc. 23. Even on the assumption that petitioners' objections are well taken, we perceive no error affecting their substantial rights."

" Affirmed."

Ralph Ginzburg's claim of a constitutional right to "pander" was rejected by the U.S. Supreme Court, see the opinion of Justice Brennan in his review of the trial facts at: (1) pages 35, footnotes 5 and 6; (2) page 36, footnote 8; (3) page 37, footnotes 9 and 11; (4) Judge Learned Hand speaking in ***U.S. v. Rebhuhn***, 109 F.2d 512, cited at page 39 and footnotes 13 and 14; (5) page 40 at footnote 15, citing ***U.S. v. Rebhuhn***, supra; (6) text at pages 40 and 41, and footnote 19 at pages 40 and 41, distinguishing the **Roth Test** for obscenity from ***Dombrowski v. Pfister***, 380 U.S. 479, 486-487, 491-492,14 L.Ed.2d 22, 28-31; 85 S.Ct. 1116; and **A.L.I. Model Penal Code Tentative Draft No. 6** (May 6,1957) pages 1-3, 13-57, Comments to the Proposed Official Draft, §251.4, supra; ***Schwartz***, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963):

"5. Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics as a whole, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting. Similarly, we accept the

Government's concession note 13, infra, that the prosecution rested upon the manner in which the petitioners sold the Handbook; thus our affirmance implies no agreement with the trial judge's characterizations of the book outside that setting."

"6. It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise irrelevant, toward that end."

"8. Evidence relating to petitioners' efforts to secure mailing privileges from these post offices was, contrary to the suggestion of Mr. Justice Harlan in dissent, introduced far the purpose of supporting such a finding. Scienter had been stipulated prior to trial. The Government's position was revealed in the following colloquy, which occurred when it sought to introduce a letter to the postmaster of Blue Ball, Pennsylvania:

> 'The COURT. Who signed the letter?
> 'Mr. CREAMER. It is signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. It is on Eros Magazine, Incorporated's stationery.
> 'The COURT. And your objection is-
> 'Mr. SHAPIRO. It is in no way relevant to

> the particular issue or publication upon which the defendant has been indicted and in my view, even if there was an identification with respect to a particular issue, it would be of doubtful relevance in that event.
> 'The COURT. Anything else to say?
> 'Mr. CREAMER. If Your Honor pleases, there is a statement in this letter indicating that it would be advantageous to this publication to have it disseminated through Blue Ball, Pennsylvania, post office. I think this clearly goes to intent, as to what the purpose of publishing these magazines was. At least, it clearly establishes one of the reasons why they were disseminating this material.
> 'The COURT. Admitted.' "

"9. Thus, one EROS advertisement claimed:

> 'Eros is a child of its times. . . .[It] is the result of recent court decisions that have realistically interpreted America's obscenity laws and that have given to this country a new breadth of freedom of expression. . . . EROS takes full advantage of this new freedom of expression. It is the magazine of sexual candor.'

"In another, more lavish spread:

> 'EROS is a new quarterly devoted to the subjects of Love and Sex. In the few short weeks since its birth, EROS has established itself as the rave of the American intellectual

community-- and the rage of prudes everywhere! And it's no wonder: EROS handles the subjects of Love and Sex with complete candor. The publication of this magazine-which is frankly and avowedly concerned with erotica-- has been enabled by recent court decisions ruling that a literary piece or painting, though explicitly sexual in content has a right to be published if it is a genuine work of art.

'EROS is a genuine work of art. . . .'

"An undisclosed number of advertisements for Liaison were mailed. The outer envelopes of these ads ask, 'Are you among the chosen few?' The first line of the advertisement eliminates the ambiguity: 'Are you a member of the sexual elite?' It continues:

'That is, are you among the few happy and enlightened individuals who believe that a man and woman can make love without feeling pangs of conscience? Can you read about love and sex and discuss them without blushing and stammering?

'If so, you ought to know about an important new periodical called Liaison.

. . . .

..

'In short, Liaison is Cupid's Chronicle. . . .

'Though Liaison handles the subjects of love and sex with complete candor, I wish to make it clear that it is not a scandal sheet and it is not written for the man in the street. Liaison is aimed at intelligent, educated adults who can accept love and sex as part of

life.

'. . . I'll venture to say that after you've read your first bi-weekly issue, Liaison will be your most eagerly awaited piece of mail.' "

"11. There is much additional evidence supporting the conclusion of petitioners' pandering. One of petitioners' former writers for Liaison, for example, testified about the editorial goals and practices of that publication."

"12. Schwartz, Morals Offenses and the Model Penal Code, 63 Col.L.Rev. 669, 677 (1963).

"13. The Government drew a distinction between the author's and petitioners' solicitation. At the sentencing proceeding the United States Attorney stated:

'. . . [the author] was distributing. . . only to physicians; she never had widespread, indiscriminate distribution of the Handbook, and, consequently, the Post Office Department did not interfere . . . . If Mr. Ginzburg had distributed and sold and advertised these books solely to . . . physicians . . . we, of course, would not be here this morning with regard to The Housewife's Handbook . . . .' "

Federal Statutes (such as the C.D.A.) which regulate anti social conduct, i.e., the dissemination of "obscenity", "indecency", etc. (on the basis of its "prurient interest") which include a specific mens rea element are not subject to a facial attack on the basis of "overbreath". Because the

Communications Decency Act of 1996 includes a specific "mens rea" element, the only behavior (by statutory definition) which falls within the ambit of the statute is behavior (anti social conduct) which is capable of being Constitutionally proscribed. The inclusion of the specific "mens rea" element provides the requisite Constitutional specificity and "narrows" the construction of the statute, confining its application to only Constitutionally permissible situations, i.e., anti social conduct involving "pandering", "talking dirty", etc., in front of minors. The use of a specific "mens rea" element has long been recognized as being central to the objectives of criminal obscenity laws and where present, such laws may only be challenged on an "as applied basis". Where the standards ("variable obscenity" factors) are not misconceived, the only serious question is whether those standards were correctly applied "to the trial facts". See, ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463,16 L.Ed.2d 31 at 35 and at pages 40-41, footnote 19, 86 S.Ct. 942.

Similarly, there is no unrestricted Constitutional right to engage in anti social conduct involving "indecency" or "indecent speech" in front of minors in view of the fact that computer systems will soon be available to all minors as an educational tool, and that minors must be regarded as a foreseeable "target" audience for all free access communications currently taking place on the Internet. See, in this regard, President Clinton's remarks on February 4,1997, in his State of the Union Address:

> ". . . Let's work together to meet these . . . goals: . . . every 12-year-old must be able to log on to the Internet. . ."

and President Clinton's weekly Radio Address remarks on February 8,1997:

> ". . . To give our children the best education we must help them to harness the powerful forces of technology. That's why we've challenged America to connect every classroom and library to the Internet by the year 2000. For the first time in history, children in the most isolated rural towns, the most comfortable suburbs, and the poorest inner-city schools will have the same access to the same universe of knowledge. . ."

and:

> ". . . By doubling our investment in education technology, by dramatically lowering the Internet rates for schools and libraries, by mobilizing Americans all across the country to help wire our schools, we will meet our goal of connecting every classroom and library to the Information Superhighway by the year 2000. That's how we must prepare our children for the 21st Century, with the full promise of the Information Age at their fingertips. And it's an important way to give our children the world's best education and the chance to make the most of their own lives. . . .").

Further, an overbreath argument which is grounded upon an asserted claim of an unrestricted "constitutional right" to engage in a specific type of "conduct", i.e., to "talk dirty" or to "indecent speech" or "indecency" (see ***Shea v.Reno***, 930 F.Supp. 916 at 922-933 [U.S. District Court, S.D.N.Y.,1996]: ". . . that §223(d) would serve as a ban on

constitutionally protected indecent communications between adults. . ." [my emphasis.]) is as meritless as the "constitutional right to pander" which was asserted but rejected in ***Ginzburg v. U.S.***, supra. See, in this regard, the eight (8) images obtained from current **free access** web sites located by using the Internet Search Engines "Yahoo" and "Alta Vista" (available to any 12-year old) using the locator request **"Adult Bookstore"**, which are reproduced at Appendix 1 herein as an attachment to the letter dated February 12, 1997, requesting the consent to file an amicus curiae brief. In the judgment of amicus curiae James J. Clancy, such images are in violation of the "variable obscenity" standards of both the **Communications Decency Act of 1996** and ***Ginzburg v. U.S.***, supra.

CONCLUSION

The judgment of the 3 Judge U.S. District Court that the challenged sections of the **Communications Decency Act of 1996** are facially unconstitutional should be reversed upon the "variable obscenity" standards expressed in Associate Justice Brennan's majority opinion in ***Ralph Ginzburg v. U.S.***, supra and the "variable obscenity" principles expressed by Judge Learned Hand in his opinions in ***U.S. v. Levine***, supra and ***U.S. v. Rebhuhn***, supra, as codified in the **A.L.I. Model Penal Code, Tentative Draft No. 6** (May 6, 1957) and the **Comments to the Proposed Official Draft §251.4.** See also *Schwartz*, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963).

The narrow configuration of this case, and the opportunity and the ability of this Court to decide the jurisdictional questions posed in this appeal by a summary reversal based upon Justice Brennan's majority opinion in

Ralph Ginzburg, et al. v. U.S., supra, affords this Court a unique opportunity— the first in 40 years— to revisit Judge Learned Hand's well reasoned opinions on obscenity and this Court's landmark decision in ***Roth v. U.S.***, 354 U.S. 476, 1 L.Ed.2d 1408, 77 S.Ct. 1314 (1957) and restore simplicity to this nation's federal obscenity statutes by reconsidering and reconciling the seemingly conflicting views of the individual Justices on this Court during those 40 years.

If this Court were to seize this unique opportunity, the following objectives and reconsideration would be worthy of consideration:

1. Reaffirm the opinions of Judge Learned Hand in ***U.S. v. Levine***, 83 F.2d 156 and ***U.S. v. Rebhuhn***, 109 F.2d 512, 514 in their entirety as a correct statement of the federal obscenity law before *Ginzburg* and Judge Hand's bifurcated view of the federal obscenity law (variable obscenity) as a correct statement of the law before and after the *Ginzburg* decision and a correct statement of the "Law of the Land" after the filing of the 5-4 *Ginzburg* Opinion (perhaps 6-3, if Justice Harlan's dissent is viewed as a "concession").

2. Reaffirm in their entirety this Court's decisions in ***Roth v. U.S.***, supra and ***Ralph Ginzburg v. U.S.***, supra (with minor adjustments and modifications as explained hereinafter).

3. Reaffirm the ***Roth-Alberts*** definition of

"appeal to the prurient interest" as an "excessive, unnatural and unlawful" interest rather than a natural, healthy and lawful interest in sex.

4. Reaffirm the law expressed in ***Roth-Alberts*** that the mens rea for the crime of dealing with "obscenity in the abstract" (obscenity vel non) is "knowledge of the contents" and does not require a person's subjective perception as to whether the subject matter is or is not obscene. See ***Rosen v. U.S.***, 161 U.S. 606 (1896).

5. Establish as one of the tests for "obscenity in the abstract": "whether all reasonable persons would agree and conclude that the subject matter is 'obscene in the abstract' as that term is defined by law (which appears to be the equivalent of Justice Harlan's and Justice Stewart's use of the term'hard core pornography')".

6. Reaffirm Justice Brennan's opinion in ***Ralph Ginzburg v. U.S.***, supra, as a correct statement of the difference between the bifurcated crimes of "obscenity in the abstract" and "pandering obscenity" and (reconciling and equating) Justice Warren's opinion on "conduct" to be a consistent statement with respect to the bifurcated "pandering crime" and Justice Harlan's and Justice Stewart's views on "hard core pornography" to be a consistent statement

treating the bifurcated "obscenity in the abstract" crime, and the law as to "specificity" expressed in ***Miller v. California***, 413 U.S. 15 (1973), to be a consistent statement treating the "obscenity in the abstract" crime..

7. Reconcile Justice Harlan's and Justice Stewart's separate opinions re "hard core pornography" in ***Ralph Ginzburg v. U.S.***, supra, with Judge Hands ruling on "obscenity in the abstract" with an explanation that their separate opinions in ***Ginzburg*** were proper (at the time ***Ginzburg*** was argued and incident to the reporting of the 5-4 landmark ruling) inasmuch as such was not the Law of the Land until ***Ginzburg*** was decided.

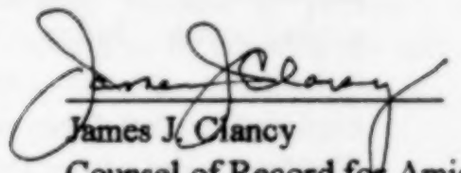
8. Adoption of Justice Harlan's view with respect to this Court's limited role in reviewing state determinations of obscenity under the 10th and 11th Amendments.

The practical end result of a reexamination of the federal law of obscenity at this time and reconciliation of the above propositions of law would be both historic and "meteoric". For example, by reaffirming Judge Learned Hand's bifurcation of the law and reaffirming the law expressed in ***Rosen v. U.S.***, supra, as controlling the crime of dealing with "obscenity in the abstract", that segment of the pornography industry holding millions of dollars in hard core videotape inventories would, overnight, find themselves holding assets which had a value of zero and

were unmarketable in the United States. Further, such a determination would help to terminate the runaway production and exhibition on Cable and Satellite T.V. of hard core pornographic films that now exists. (See U.S. News and World Report, dated February 10, 1997.

DATED: February 17, 1997

Respectfully submitted,



James J. Clancy
Counsel of Record for Amicus Curiae

APPENDIX 1

COPY OF ATTORNEY JAMES J. CLANCY'S 4 PAGE LETTER OF REQUEST FOR CONSENT TO FILE AN AMICUS CURIAE BRIEF, WITH 8 PAGES OF ATTACHMENTS IN ***RENO V. A.C.L.U., ET AL.***, U.S. SUPREME COURT NO. 96-511, FAXED TO APPELLANTS ON FEBRUARY 12, 1997.

Reference: (1) Motion For Leave To File An Out Of Time Amicus Curiae Brief In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511, Under Rule 37(3)(b) With Attached Brief Amicus Curiae Of James J. Clancy (Member Of The Supreme Court Bar) At **Page 4**.

Reference: (2) Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

JAMES J. CLANCY
ATTORNEY AT LAW
9055 LA TUNA CANYON ROAD
SUN VALLEY, CALIF. 91352
(818) 352-2069
FAX (818) 352-6549

February 12,1997

Christopher A. Hansen, Esq.
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036

Re: Request for consent to file a brief for Amicus Curiae James J. Clancy in ***Reno v. A.C.L.U.***, No. 96-511, suggesting a simple reversal of the Three Judge District Court Judgment below upon the "variable obscenity" factors upheld in ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942, rehearing denied 384 U.S. 934,16 L.Ed2d 536, 86 S.Ct.1440 (3/21/66) (interpreting **18 U.S.C. §1461**): (criminal law requirements: ***Ginzburg***, footnotes 13,14 and 15; "pandering" concept: ***Ginzburg***, footnote 14; "prurient" appeal: ***Ginzburg***, footnote 19).

Dear Mr. Hansen;

I respectfully request your consent for Appellees, the **American Civil Liberties Union, et al.**, to the filing of a brief for James J. Clancy as amicus curiae in support of a simple reversal of the judgment below upon the

"variable obscenity" factors which were argued in the appellate briefs and upheld by the U.S. Supreme Court in ***Ralph Ginsburg, et al. v. U.S., 383 U.S.*** 463,16 L.Ed.2d 31, 86 S.Ct. 942, rehearing denied 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct.1440 (3/21/66) (interpreting the term "obscene" as employed in **18 U.S.C.§1461**): (criminal law requirements: ***Ginzburg***, footnote 13,14 and 15; "pandering" concept: ***Ginzburg***, footnote 14; "prurient" appeal: ***Ginzburg***, footnote 19).

The four jurisdictional questions in the Jurisdictional Statement in ***Reno v. A.C.L.U.***, No. 96-511 present a narrow issue as to whether each of the sections of the **"Communication Decency Act of 1996"** ("C.D.A.") which is under attack, "is unconstitutional on its face". The three Judge U. S. District Court below upheld the challenge of the A.C.L.U. on that narrow ground and granted a preliminary injunction.

The amicus curiae brief for James J. Clancy will contend that the ***Reno v. A.C.L.U.*** trial court was in error and should have held that, under the "variable obscenity" principles approved by the U.S. Supreme Court in ***Ginzburg, et al. v. U.S.***, supra, the terms "obscene", "indecent", "patently offensive as measured by community standards", and "sexual or excretory activities or organs", as used in the **Communications Decency Act of 1996** are not subject to attack under ***Dombrowski v. Pfister***, 380 U.S. 479 (see ***Ginzburg***, supra, at pages 40 and 41, footnote 19)

Each of the challenged sections in such act is susceptible of a constitutional construction, in that such sections of the **Communications Decency Act of 1996** do nothing more than proscribe a type of "conduct" under federal "variable obscenity" standards which is of the same nature as that under which Ralph Ginzburg was indicted, convicted and sentenced to a five year jail term, see ***Ginzburg***, supra at page 39 and footnote 14, citing the **Proposed Official Draft of the A.L.I. Model Penal Code**. The "variable obscenity" factors set forth in the **Communications Decency Act of 1996** are the functional equivalent of the "variable obscenity" factors discussed and applied in ***Ginzburg***, supra. See, also, ***U.S. v. Rebhuhn***, 109 F.2d 512, cert. den. 310 U.S. 629, 84 L.Ed 1399, 60 S.Ct. 976, relied upon in ***Ginzburg***, supra, at pages 39 and 40, footnote 15.

Ralph Ginzburg's claim of a constitutional right to "pander" was rejected by the U.S. Supreme Court, see the opinion of Justice Brennan at: (1) pages 35, footnotes 5 and 6; (2) page 36, footnote 8; (3) page 37, footnotes 9 and 11; (4) Justice Learned Hand speaking in ***Rebhuhn v. U.S.***, 109 F.2d 512, cited at page 39 and footnotes 13 and 14; (5) page 40 at footnote 15, citing ***U.S. v. Rebhuhn***, supra; (6) text at pages 40 and 41, and footnote 19 at pages 40 and 41, distinguishing the **Roth Test** for obscenity from ***Dombrowski v. Pfister***, 380 U.S. 479, 486-487, 491-492,14 L.Ed.2d 22, 28-31; 85 S.Ct. 1116; and **A.L.I. Model Penal Code Tentative Draft No. 6** (May 6,1957) pages 1-3, 13-57, Comments to the Proposed Official Draft

§251.4, supra; *Schwartz*, **Morals Offenses and the Model Penal Code**, 63 Col.L.Rev. 669, 677-681 (1963).

Federal Statutes (such as the C.D.A.) regulating "obscenity", "indecency", etc. (on the basis of its "prurient interest") which include a specific mens rea element are not subject to a facial attack on the basis of "overbreath". Because the C.D.A. includes a specific "mens rea" element, the only behavior (by statutory definition) which falls within the ambit of the statute is behavior which is capable of being Constitutionally proscribed. The inclusion of the specific "mens rea" element provides the requisite Constitutional specificity and "narrows" the construction of the statute, confining its application to only Constitutionally permissible situations, i.e., "pandering", "talking dirty". The use of a specific "mens rea" element has long been recognized as being central to the objectives of criminal obscenity laws and where present, such laws may only be challenged on an "as applied basis". Where the standards ("variable obscenity" factors) are not misconceived, the only serious question is whether those standards were correctly applied "to the trial facts". See, ***Ralph Ginzburg, et al. v. U.S.***, 383 U.S. 463,16 L.Ed.2d 31 at 35 and at pages 40-41, footnote 19, 86 S.Ct. 942.

Similarly, there is no unrestricted Constitutional right to "indecency" or "indecent speech". In light of the fact that computer systems will soon be available to all minors as an educational tool, and that minors must be regarded as a foreseeable "target" audience for all free

access communications currently taking place on the Internet (see President Clinton's remarks on February 4,1997, in his State of the Union Address:

> ". . . Let's work together to meet these . . . goals: . . . every 12-year-old must be able to log on to the Internet. . .",

and President Clinton's weekly Radio Address remarks on February 8,1997:

> ". . . To give our children the best education we must help them to harness the powerful forces of technology. That's why we've challenged America to connect every classroom and library to the Internet by the year 2000. For the first time in history, children in the most isolated rural towns, the most comfortable suburbs, and the poorest inner-city schools will have the same access to the same universe of knowledge. . ."

and:

> ". . . By doubling our investment in education technology, by dramatically lowering the Internet rates for schools and libraries, by mobilizing Americans all across the country to help wire our schools, we will meet our goal of connecting every classroom and library to the Information Superhighway by the year 2000. That's how we

> must prepare our children for the 21st Century, with the full promise of the Information Age at their fingertips. And it's an important way to give our children the world's best education and the chance to make the most of their own lives. . . .''),

an overbreath argument which is grounded upon an asserted claim of an unrestricted "constitutional right to "talk dirty" or to "indecent speech" or "indecency" (see ***Shea v. Reno***, 930 F.Supp. 916 at 922-933 [U.S. District Court, S.D.N.Y., 1996]: ". . . that §223(d) would serve as a ban on constitutionally protected indecent communications between adults. . .") is as meritless as the "constitutional right to pander" which was asserted but rejected in ***Ginzburg v. U.S.***, supra. See, in this regard, the eight (8) images obtained from current **free access** web sites located by using the Internet Search Engine "Yahoo" (available to any 12-year old) using the locator request **"Adult Bookstore"**, which are reproduced hereinafter as an attachment to this letter. In the judgment of amicus curiae James J. Clancy, such images are in violation of the "variable obscenity" standards of both the **Communications Decency Act of 1996** and ***Ginzburg v U.S.***, supra.

A motion to file a tardy brief amicus curiae under U.S. Supreme Court Rule 37(3)(e) with brief attached and the reasons for granting the same will be filed some time during the week of February 9-13, approximately a week in advance of the date upon which Appellee A.C.L.U.'s

reply brief will be due (February 20, 1997). The amicus curiae brief (in support of neither party) will be limited to the above argument, which is framed in this letter, i.e., the suggestion that the judgment below should be reversed upon the principle of law ("variable obscenity" standard) applied in ***Ginzburg v. U.S.***, supra., which is not discussed in the Brief for the Appellants or the Amicus Curiae Brief of the National Law Center for Children and Families (which were due on or about January 20, 1997. (My emphasis.)

Thank you for your consideration in this regard.

Sincerely yours,

James J. Clancy
for Amicus Curiae.

JJC/cjc

Sep. letters to: Bruce J. Ennis, Esq., Jenner & Block
Hon. Walter Dellinger, Acting Solicitor General.

cc: Mr. Bruce Taylor, Esq., Counsel for Amici Curiae, National Law Center for Children and Families.

Adult Site Of The Week!

Brought to you by Alexis & Debbie

Every week a new adult site is awarded Global's "Adult Site Of The Week". You can see sample pic's and a profile on the awarded site. Stop back weekly for the hottest adult stuff on the net.

Hi Guys,

Please take a moment to read this while the page is loading. Debbie & myself (I'm Alexis) would like to thank you for stopping by our site. This started out as just a hobby but turned into a business. No, I don't do all this technical stuff myself, we hire a pro for that but we do read our mail and tell our webmaster what to do with the pages. We do have one favor to ask you. If you like our free pics (and we think we give you a lot of them), please join our site. It is only $7.95 for 3 months! It costs us a lot of money every month to keep this running. For the cost of a coffee and a bagel you can see a few thousand quality pics. That's a fair deal. One more thing, sorry about all the banners, they give us some income so we can keep the site up. There is none in the members area. Thanks and don't forget to visit our sponsors! **Have A Great New Year!**

Love ya,
Alexis

PORN TV! Browse & Search 10,000+ Fast-Downloading Nasty Video Clips, for FREE!

Do You Have An Attractive WIFE or GIRLFRIEND?
Click HERE for details on how you can earn up to $1,000 per month or more with no cost to you. The shy need not apply!

Welcome To Our Place!

FREE GUEST
You will be able to access the winners area and view all 10 sample pics and view 1 sample pic from each past winner area

GOLD MEMBER
You will have FULL access to the entire site including the winners area to view all the sample pics from the winning site and complete archive of all past winners. In addition, you will have access to our entire picture collection.
Register For Gold Membership $7.95

Click Here for a FREE test-drive of the only 250,000-file all-XXX search engine on the net.

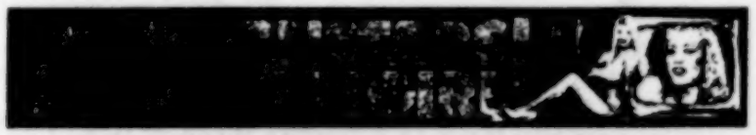
- - - *Navigation Area* - - -

Main Picture Area

Nominated Sites (links) || Suggest A Site || Mail Us
Get Membership || Sex Toys || Sponsorship || Your Own Amateur Site

Some Of Our Other Sites

- Amateurs Galore - Lots of free pics
- Kitty Foxx - The best in hard core
- Amateur Kim - This blonde will knock your socks off
- Florida Amateurs - These girls will make you hot!
- Amateur Alexis - This 21 year old has a killer body!
- SB-90 Sex Booster - Guaranteed to increase your sexual performance or your money back!



banner Free The Official The Pics of the Day Free
Proud Member of BannerSwap

Cliffs Image | 4 Adults

Award of Adult Excellence!

Last Updated on Sunday, 19 January, 1997 at 12:00 PM

- Since update: No Counter?

menu

The Bottom Line
The Fine Print
Model's Release
Sample Site
Navigation Area
Send mail

Links
Add A Link

cash in on the internet explosion!

We Will Build You *Your own* (Money Making) Amateur Web Site!

THE BOTTOM LINE

If you have an attractive wife or girlfriend and she is not the shy type, we can give you your own **MONEY MAKING** Web site for FREE! Here are the details:

- Global will design a web site for you and host it on our own server. You will have your own address "http://www.herewego.com/**your name**"
- Global will place your site on over 100 link sites and search engines to promote your site.
- Global will feature your site on our Adult Site Of The Week site to kick off your page.
- All you need to do is supply us some good quality original pictures of yourself and we will do the rest.
- We will handle ALL set-up charges and give you 50% of the profit of your site (about $1.50 per registration). You can be up and running in as little as 1 week after we receive your pictures.
- Average income from your site should be between $500 to $1,500 per month. However, it could be as much as $4,000 to $5,000 per month depending on how GOOD the pictures are.
- You will also receive a list of FREE and PAY areas to post your site and increase traffic. You will be able to do this on your free time.
- You will receive access codes for your site so you can log on to our billing company and receive up to the minute stats on how your site is doing.

THE FINE PRINT

Here are some of the fine points you should be aware of. Please read them carefully. When you are finished you can print out a Model Release Agreement to get your site under way.

- **FIRST** - Before you do anything! Please E-Mail us a picture of the person who will be featured on the site. This **does not** have to be a nude shot however that would be perferred.
- Since every site is different, we cannot guarantee any amount af money each Month, however, from our experience we found the $500 per month number to be the minimum one of our sites make.

- - - Navigation Area - - -

Main Picture Area || Nominated Sites (links) || Suggest A Site || Mail Us
Get Membership || Sex Toys || Sponsorship || Your Own Amateur Site || Home

Your Own Amateur Web Site! http://www.herewego.com/amateur/

According to you are visitor no. to this page No Counter?

Last Updated by on Monday, 6 January, 199? at 10:35 PM

NEW!!! ... ADULT VIDEO

NEW!!! ... BEAUTIFULL NUDE GIRLS ON LIVE VIDEO FEED

Video Fantasy

GREAT XXX PICTURES

UNLIMITED AXCESS ON JOINING! $10 JOINING FEE !!!

Q. What can I expect to find here ?

A. THE BEST XXX PICTURES ON THE NET

INTERESTED ?

None of the pictures are censored in any way once you join !!.

Click HERE To Join and Enjoy

Other Links

Other Adult Sites

APPENDIX 2

COPY OF APPELLEE A.C.L.U. AND APPELLEE A.L.A. FAX LETTERS, DATED FEBRUARY 13, 1997 IN WHICH APPELLEES A.C.L.U. AND A.L.A. REFUSE TO GRANT THEIR CONSENT TO THE FILING OF A BRIEF AMICUS CURIAE BY JAMES J. CLANCY (MEMBER OF THE SUPREME COURT BAR) IN ***RENO V. A.C.L.U., ET AL.***, U.S. SUPREME COURT NO. 96-511.

Reference: (1) Motion For Leave To File An Out Of Time Amicus Curiae Brief In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511, Under Rule 37(3)(b) With Attached Brief Amicus Curiae Of James J. Clancy (Member Of The Supreme Court Bar) At **Page 5**.

Reference: (2) Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

SENT BY: 2-13-97; 11:58; 2127304652-> ;# 2/ 2
A.C.L.U.F. LEGAL DEPARTMENT
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
National Headquarters
132 West 43rd Street
New York, N.Y. 10036
Chris Hansen
Senior Staff Counsel
(212) 944-9800 Ext. 540
Fax (212) 730-4652
E-mail chrisaclu@aol.com

February 13,1997

James J, Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

Re: Reno v. ACLU, No. 96-511

Dear Mr. Clancy:

I received your fax to Bruce Ennis concerning an amicus brief in this case. You should first be aware that Mr. Ennis does not represent appellees ACLU et al. He represents other appellees. On behalf of the appellees ACLU et al., we do not consent to the filing of your brief.

We consented to every amicus who sought to file a brief in a timely manner. Your brief is untimely. Given the schedule necessary to print our brief, we would be unable to respond to your arguments and thus prejudiced by its filing. Moreover, you describe your brief as one in support of neither party; it is not. By urging simple reversal, you are supporting appellants. If you file the motion, we will oppose it.

Thank you.

Sincerely,
Christopher A. Hansen
Counsel of record for the ACLU appellees

cc: Bruce J. Ennis
Hon. Walter Dellinger

SENT BY: JENNER & BLOCK 2-13-97;10:11;2026396066->;# 2

LAW OFFICES JENNER & BLOCK
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
601 THIRTEENTH STREET, N.W.,SUITE 1200
WASHINGTON, D.C. 20005
(202) 639-6000 (202) 639-6066 FAX
Bruce J, Ennis DIRECT DIAL NUMBER: 202-639-6025

February 13, 1997

VIA TELEFAX (818) 352-6549
James J. Clancy, Esquire
Law Office of James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352
Re: Reno, et al. v. ACLU, et al., No. 96-511

Dear, Mr. Clancy;
I have just received your request for consent to file an out-of-time amicus brief, on your on behalf, supporting reversal of the judgment above.

I do not consent to the filing of the proposed brief, and would oppose any motion for leave to file.

Although appellees consented to every timely request to file an amicus brief supporting the government, your request is untimely and would deny appellees of a meaningful opportunity to respond to the points you would propose to cover in your amicus brief.

Sincerely,
Bruce J. Ennis
Counsel for ALA Appellees
cc: Hon. Walter Dellinger (by fax)
Christopher Hansen (by fax)
Jerry Berman, CDT

APPENDIX 3

COPY OF LIST OF 56 CASES IN WHICH AMICUS CURIAE JAMES CLANCY HAS FILED AMICUS CURIAE AND APPELLATE BRIEFS IN THIS COURT IN OBSCENITY LITIGATION DURING 1963-1990.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 2**

1. ***Smith v. California***, 375 U.S. 259, 11 L.Ed.2d 311 (1963).

2. ***Arnebergh v. Zeitlin*** , 375 U.S. 957, 11 L.Ed.2d 315 (1963).

3. ***Jacobellis v. Ohio***, 378 U.S. 184, 12 L.Ed.2d 793, 1333 (1964).

4. ***Memoirs v. Massachusetts***, 383 U.S. 413, 16 L.Ed.2d l, 1052 (1966).

5. ***Ginzburg v. United States***, (two briefs): 383 U.S. 463, 16 L.Ed.2d 31, 1079 (1966)

6. ***Mishkin v. New York***, 383 U.S. 502, 16 L.Ed.2d 56, 1082 (1966).

7. ***Redrup v. New York***, (two briefs): 386 U.S. 767, 18 L.Ed.2d 515, 1520 (1967).

8. ***Austin v. Kentucky***, (two briefs): 386 U.S. 767, 18 L.Ed.2d 515, 1520 (1967).

9. ***Aday v. United States***, 388 U.S. 447, 18 L.Ed.2d 1309 (1967).

10. ***Ginsberg v. New York***, (two briefs): 390 U.S. 629, 20 L.Ed.2d 195, 1486 (1968).

11. ***Cain v. Kentucky***, 397 U.S. 434, 35 L.Ed.2d 334 (1970)

12. ***Cohen v. California***, 403 U.S. 15, 29 L.Ed.2d 284, 1010 (1971).

13. ***Rabe v. Washington***, 405 U.S. 313, 31 L.Ed.2d 258 (1972).

14. ***Papish v. Board of Curators***, 411 U.S. 960, 36 L.Ed.2d 419 (1973).

15. ***Paris Adult Theatre I v. Slaton***, 413 U.S. 49, 37 L.Ed.2d 446 (1973).

16. ***Heller v. New York***, 413 U.S. 483, 37 L.Ed.2d 745 (1973).

17. ***Roaden v. Kentucky***, 413 U.S. 496, 37 L.Ed.2d 757 (1973).

18. ***Grove Press v. Flask***, 413 U.S. 902, 37 L.Ed.2d 1013 (1973).

19. ***Film Entitled "Vixen" v. Ohio, ex rel. Keating***, 413 U.S. 905, 37 L.Ed.2d 1016 (1973).

20. ***Michigan v. Bloss***, 413 U.S. 909, 37 L.Ed.2d 1021 (1973).

21. ***Huffman v. U.S. District Court***, 413 U.S. 918, 37 L.Ed.2d 1039 (1973).

22. ***Boyd v. Ohio***, 418 U.S. 945, 41 L.Ed.2d 1175 (1973).

23. ***Jenkins v. Georgia***, 418 U.S. 153, 41 L.Ed.2d 642 (1974).

24. ***Smith v. Keaton***, 419 U.S. 1043, 42 L.Ed.2d 636 (1974).

25. ***Huffman v. Pursue, Ltd.***, (two briefs): 420 U.S. 592, 43 L.Ed.2d 482 (1975) (James J. Clancy presented oral argument).

26. ***Fair v. Smith***, 421 U.S. 902, 43 L.Ed.2d 769 (1975).

27. ***Art Theatre Guild v. Ewing***, 421 U.S. 923, 44 L.Ed.2d 82 (1975).

28. ***People, ex rel. Camil v. Superior Court***, 424 U.S. 943, 47 L.Ed.2d 348 (1976).

29. ***Alabama, ex rel. Sweeton v. General Corp.***, 425 U.S. 904, 47 L.Ed.2d 753 (1976).

30. ***Smith v. United States***, 426 U.S. 946, 49 L.Ed.2d 1183 (1976).

31. ***People, ex rel. Camil v. Superior Court***, 429 U.S. 1097, 51 L.Ed.2d 544 (1977).

32. ***Marks v. United States***, 430 U.S. 188, 51 L.Ed.2d 260 (1977).

33. ***Harmer v. "Devil in Miss Jones"***, 430 U.S. 967, 52 L.Ed.2d 359 (1977).

34. ***Splawn v. California***, 431 U.S. 595, 52 L.Ed.2d 606 (1977).

35. ***Harmer v. "Deep Throat"***, 432 U.S. 907, 53 L.Ed.2d 1079 (1977).

36. ***Ballew v. Georgia***, 435 U.S. 223, 55 L.Ed.2d 839 (1978).

37. ***City of East Detroit v. Llewellyn***, 438 U.S. 909, 57 L.Ed.2d 1152 (1978).

38. ***Lo-Ji Sales v. New York***, 442 U.S. 319, 60 L.Ed.2d 920 (1979).

39. ***Vance v. Universal Amusement Co.***, (two briefs): 445 U.S. 308, 63 L.Ed.2d 413 (1980).

40. ***City of Newport v. Fact Concerts***, 453 U.S. 247, 69 L.Ed.2d 616 (1981).

41. ***Cooper v. Mitchell Brothers' Santa Ana Theatre***, (three briefs): 454 U.S. 90, 70 L.Ed.2d 262 (1981).

42. ***Brockett v. Spokane Arcades***, 454 U.S. 1022, 70 L.Ed.2d 468 (1981).

43. ***U.S. Marketing, Inc. v. Idaho***, (three briefs): review granted, 434 U.S. 1140, 71 L.Ed.2d 291 (Jan. 11, 1982); appeal dismissed by ***U.S. Marketing***, 455 U.S. 1009, 71 L.Ed.2d 878 (March 10, 1982).

44. ***James J. Clancy, et al. v. Jartech, Inc.***, (three briefs): 459 U.S. 826, 74 L.Ed.2d 62 (1982).

45. Petition for Writ of Certiorari in ***Billmeyer v. Tovar***, No. 83-2041 (1984). Petition denied as untimely. Blackmun and Stevens would deny the petition. 469 U.S. 872, 83 L.Ed.2d 152, 105 S.Ct. 223 (Oct. 1, 1984).

46. Amicus Curiae Brief of City Attorney of Renton, Washington, in ***Brockett v. Spokane Arcades, Inc., et al.***, No. 84-28 (1984), and ***Eikenberry v. J-R Dist., Inc.***, No. 84-143, reversed and remanded in 470 U.S. 491, 86 L.Ed.2d 394 (June 19, 1985).

47. Petition for Writ of Certiorari in ***People ex rel. Ed Cooper, City Attorney of Santa Ana, Calif. v. Mitchell Brothers' Santa Ana Theater***, No. 85-439, denied in 474 U.S. 948, 88 L.Ed.2d 293, rehearing denied, 474 U.S. 1077, 88 L.Ed.2d 811 (Nov. 4, 1985).

48. ***City of Corona, a Municipal Corp., et al. v. Superior Court of the State of California for the County of Riverside***, 475 U.S. 1121, 90 L.Ed.2d 184, 106 S.Ct. 1638 (April. 21, 1986) (No. 85-1402) petition for certiorari filed 2/18/86, denied 4/21/86).

49. ***City of Corona v. Superior Court***, No. 86-17, petition for certiorari filed July 2,1986. Defense Attorney Diamond was requested to make response August 2,1986. Diamond declined opposition to writ on August 27, 1986. Petition denied in 479 U.S. 848, 93 L.Ed.2d 108 (October 6, 1986).

50. Petition for Writ of Certiorari in ***Citizens for Decency through Law, Inc. v. Oak Industries, Inc.***, No. 86-394, denied in ___ U.S. ___, ___ L.Ed.2d ___; ___ S.Ct. ___ (19__).

51. ***City of Paducah, et al. v. Investment Entertainment, Inc., et al.***, 479 U.S. 915, 93 L.Ed.2d 290 (1986).

52. Amicus Curiae Brief of City of Santa Ana in Support of Respondent in ***Pope, et al. v. Illinois***, 481 U.S. 497, 95 L.Ed.2d 439 (May 4, 1987).

53. ***Richard Arcara, Dist. Attorney of Erie County v. Cloud Books, Inc.***, 478 U.S. 697, 92 L.Ed.2d 568 (1986)

54. ***Herceg v. Hustler Magazine***, No. 87-113, Petition for Certiorari filed July 19, 1987. Motion to file amicus brief granted October 5, 1987. Certiorari denied March 21, 1988, 485 U.S. 959, 99 L.Ed.2d 420 (March 21, 1988).

55. Amicus Curiae Brief of James J. Clancy as Attorney for Applegate and Linda Marciano in ***Fort Wayne Books, Inc. v. Indiana***, No. 87-470, filed July 7, 1988; motion granted in ___ U.S. ___, 102 L.Ed.2d 21 (October 3, 1988), 489 U.S. ___, 103 L.Ed.2d 34 (February 21, 1989).

56. ***Karen Applegate, et al. v. Superior Court*** and ***People v. Freeman***, No. 88-1050, Petition for Certiorari denied, ___ U.S. ___, 103 L.Ed.2d 194 (February 21, 1989).

APPENDIX 4

COPY OF BRIEF AMICUS CURIAE OF CITIZENS FOR DECENT LITERATURE, INC., IN ***RALPH GINZBURG, ET AL. V. U.S.***, FILED IN SUPPORT OF RESPONDENT UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 4**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to
the United States Court of Appeals for the Third Circuit**

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent

CHARLES H. KEATING, JR.
3300 Carew Tower
Cincinnati, Ohio 45202

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Amicus Curiae

SUBJECT INDEX

Page

Interest of amicus curiae 1

Statement of the case 2

United States of America: case in chief 7

Ralph Ginzburg et al.'s defense 10

United States of America: rebuttal 26

Summary of argument 29

Argument 32

I.

An integrated review of the obscenity case law 32

A. Public policy 32

B. The problem of previous restraint cases 38

C. The no clear majority decisions 41

D. A major national problem 43

E. A problem of communication 45

F. Reconciling the cases 51

II.

This Court should affirm the judgment 54

A. Introduction 54

B. The Roth-Alberts facts control 56

C. The Roth-Alberts standards 60

D. The Trial Court followed the Roth-Alberts Standards 61

1. Liaison Vol. 1, No. 1 62

2. The Housewife's Handbook of Selective Promiscuity 63

3. Eros Vol. 1 No. 4 66

Page

E. Social importance 68
1. It is not determined in a vacuum 68
2. Slight social importance does not exculpt 72

Conclusion 77

Appendix A. The Housewife's Handbook on Selective Promiscuity .....App. p. 1

TABLE OF AUTHORITIES CITED

Cases Page

A Quantity of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 .....38, 40, 42, 52
Alberts v. California, 314 U.S. 160 58
Alberts v. California, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 .....29, 31, 34, 37, 38, 39 .....40, 53, 55, 56, 58, 60
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 76
Arizona v. Locks, 97 Ariz. 148, 397 P. 2d 949 42
Astore v. U.S., 288 F. 2d 26, cert. den. 366 U.S. 825, 81 S. Ct. 1352, 6 L. Ed. 2d 384 47
Bantam Books Inc. v. Sullivan, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584, 176 A. 2d 393 .....38, 52
Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 34
Burstein v. U.S., 178 F. 2d 665 .....62, 66, 69
Butler v. Mich, 352 U.S. 80 46
Cain, Robert H. v. U.S., 274 F. 2d 598, cert. den. 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 46
California v. Milton Luros, et al., Superior Court Case No. 295,183 43
Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 .....33, 34, 62, 72
Chi. v. Charles Kimmel, 63 M.C. 190116 18
Chi. v. Dahlia, 64 M.C. 127005 18
Chi. v. Soden, 63 M.C. 155883 18
Chi. v. Westbery, 63 M.C. 104281 18
Chi. v. Wood, 63 M.C. 156720 18
Chobot, Joseph v. Wisconsin, 12 Wis. 2d 110, 106 N.W. 2d 286, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85, rehear. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 .....45, 47, 59

Page

Collier, Frank L. v. U.S., 283 F. 2d 780, cert. den. 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 ..45, 47
Connecticut v. Andrews, 150 Conn. 92, 186 A. 2d 546 .....39, 50
Connecticut v. Sul, 146 Conn. 78, 147 A. 2d 686 71
Dale Book Co. v. Leary, 233 F. Supp. 754 .....18, 40
Darnell, John III, v. U.S., 316 F. 2d 813, 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 49
Finkelstein, Louis et al. v. New York, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den., 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 48
Freedman v. Maryland, 380 U.S. 51 .....38, 52
Fried, Harry v. New York, 238 N.Y.S. 2d 742, 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 49
Goldstein, Arthur v. Virginia, 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 .....45, 48
Grove Press Inc. v. Gerstein, 378 U.S. 577 .....41, 42
Hadley v. Arkansas, 205 Ark. 1027, 172 S.W. 2d 237 39
Haldeman v. U. S., 340 F. 2d 59 45
Heinecke, Alfred J. v. U.S., 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 .....45, 48
Hochman, Samuel R. v. U.S., 277 F. 2d 631, 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61, rehear. den., 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 .....46, 47
Jacobellis v. Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 .....42, 45, 51, 59, 71, 73, 76
Kahn, Harold S. v. U.S., 300 F. 2d 78, cert. den. 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 48
King v. Commonwealth, 233 S.W. 2d 522 39

Page

Kingsley Book Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 .....39, 59, 71
Larkin v. G. I. Distributors Inc., 14 N.Y. 2d 869 41
Larkin v. G. P. Putnam's Sons, 14 N.Y. 2d 399 ....41, 75
Luros v. Hanson, Sept. 27, 1965, Oct. Term. 1965, No. 620 39
Manual Enterprises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639, 289 F. 2d 455 ....38, 40 .....41, 42, 52
Marcus v. Kansas City Search Warrants, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127, 344 S.W. 2d 119 .....38, 40, 52
Matthews, John G. v. Florida, 356 U. S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 46
Mishkin, Edward v. U.S., 317 F. 2d 634, cert. den. 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 48
Missouri v. Becker, 364 Mo. 1079, 272 S.W. 2d 283 39
Missouri v. Vollmar, 389 S.W. 2d 20 40
Monfred, Harry et al. v. Maryland, 226 Md. 312, 173 A. 2d 173, cert. den. 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 .....45, 47, 48
Mounce v. U.S., 355 U.S. 180, 2 L. Ed. 2d 187, 247 F. 2d 148, 134 F. Supp. 490 38
Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 .....29, 33, 34, 38, 53
Nebraska v. Jungclaus, 176 Neb. 641, 126 N.W. 2d 858 40
New York v. Harry Fried, 18 A. 2d 996, 238 N.Y.S. 2d 742 44
New York v. Ray Kirk, Birch, All State News Co. Inc., et al., 40 Misc. 2d 626, 243 N.Y.S. 2d 525 .. 44
New York v. Richmond County News Co., 175 N.E. 2d 681 .....40, 41

Page

Oakley, Roy A. v. U.S., 290 F. 2d 517, cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87, rehear. den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 ..... 45, 47

One Inc. v. Olesen, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352, 241 F. 2d 772 38

Outdoor American Corporation v. City of Philadelphia, 333 F. 2d 1963, cert. den. 85 S. Ct. 192, 13 L. Ed. 2d 176 39

Padell, Max v. U.S., 262 F. 2d 357, cert. den. 359 U.S. 942, 79 S. Ct. 723, 3 L. Ed. 2d 676 46

Parr, Wyman Hulan v. U.S. 255 F. 2d 86, cert. den. 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 46

People v. Bruce, 31 Ill. 2d 459, 202 N.E. 2d 497 ..76, 77

People v. Fritch, 13 N.Y. 2d 119 41

People v. The Bookcase Inc. et al., 14 N.Y. 2d 409 .. 41

Poss v. Christenberry, 179 F. Supp. 411 70

Rosen v. U. S., 161 U.S. 606 ..... 32, 34

Roth v. U.S., 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 ..... 29, 31, 34, 38, 39, 40, 53 ..... 56, 58, 60, 65, 67, 71, 72, 76

State v. Andrews, 186 A. 2d 546 72

Sunshine Book Co. v. Summerfield, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352, 249 F. 2d 114, 128 F. Supp. 564 ..... 38, 70

Times Film Corporation v. City of Chicago, 355 U.S. 35, 78 S. Ct. 115, 2d L. Ed. 2d 72, 244 F. 2d 432, 139 F. Supp. 837 ..... 38, 39

Times Film Corp. v. City of Chicago, 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403, 272 F. 2d 90, 180 F. Supp. 843 38

Tralins v. Gerstein, 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 42

Page

Trans-Lux Distributing Corp. v. Board of Regents of the University of New York, 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 ..... 38, 52

United States v. Kennerley, 209 Fed. 119 65

United States v. Klaw and Jack Kramer, 350 F. 2d 155 45

United States v. Levine, 83 F. 2d 156 ..... 62, 66

United States v. Linetsky, No. T-CR 582 45

United States v. Ralph Ginzburg et al., 224 F. Supp. 129 28

United States v. Ralph Ginzburg, et al., 338 F. 2d 12 29

United States v. Roth, 237 F. 2d 796 56

United States v. Wasserman No. T-CR 581 45

United States v. West Coast News Co., et al., 228 F. Supp. 171 19

Wenzler, Harold Eugene, Sr., and John Imlay v. California, 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, 85 S. Ct. 14, 13 L. Ed. 2d 77 ..... 45, 49, 50

Williamson, Samuel Dodd v. California, 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047, 85 S. Ct. 13, 13 L. Ed. 2d 77 49

Womack, Herman v. U.S., 294 F. 2d 204, cert. den. 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 ..... 47, 48

Zeitlin v. Arnebergh, 59 Cal. 2d 901, 31 Cal. Rptr. 800 ..... 41, 75

Zucker, Harold v. New York, 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed 2d 100 48

Zuideveld, Nirvana Ward v. U.S., 316 F. 2d 873, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 49

Page

Dictionary

Webster's Collegiate Dictionary, Fifth Edition 32

Miscellaneous

American Law Institute, Model Penal Code (1957 draft), Sec. 207.10, p. 14 .....53, 66, 73
American Law Institute, Model Penal Code (1957), Sec. 207.10(2) 61
American Law Institute, Model Penal Code (1957), Sec. 207.10(2)f 63, 65, 67
American Law Institute, Model Penal Code (1962), Sec. 251.4(4) 59
41 Chicago Bar Record (1960), pp. 416, 418 54
IX Frumkin, Robert M., Dr., Journal of Human Relations (Summer 1962), p. 513 5
XL Notre Dame Lawyer, No. 1 (Dec. 1964), p. 10 54

Statutes

United States Code, Title 18, Sec. 1461 .....4, 5, 10
United States Code, Title 28, Sec. 1257 58
United States Constitution, First Amendment 2
United States Constitution, Fifth Amendment 68
United States Constitution, Sixth Amendment 68
United States Constitution, Fourteenth Amenement 68

Textbooks

49 American Bar Association Journal (Sept. 1963), p. 869 40
Black, Handbook of Judicial Precedent (1912), pp. 135-136 42

Page

45 Minnesota Law Review, p. 5 .....56, 57, 58
45 Minnesota Law Review, p. 20 56
45 Minnesota Law Review, p. 21 57
45 Minnesota Law Review, p. 22 57
45 Minnesota Law Review, p. 25 58
Stern and Gressman, Supreme Court Practice, 3rd Ed., p. 67 58
Stern and Gressman, Supreme Court Practice, 3rd Ed., p. 182 51
Wambaugh, The Study of Cases (2nd Ed., 1894), p. 50 42

N THE

Supreme Court of the United States

October Term, 1965
No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the

Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

Ralph Ginzburg, et al. v. United States of America is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On August 13, 1962, Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on August 14, 1962.

In letters dated September 4, 1962 and October 18, 1962, Eros Magazine, Inc. wrote the postmasters of Blue Ball, Pa., and Intercourse, Pa. as follows:

> "After a great deal of deliberation we have decided that it might be advantageous for our direct mail to bear the postmark of your city."

The letters were on Eros Magazine, Inc. stationery and were signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg. The postmaster of Intercourse, Pa., by letter dated September 8, 1962, replied that his post office was too small to handle bulk mailings.

Eros Magazine, Inc. of 110 West 40th St., New York, commenced mailings from Middlesex post office on October 7, 1962. Approximately 5,053,884 pieces of bulk mail advertisements for Eros Magazine had been mailed up to the date of trial, June 10, 1962, at a total cost of $132,704.93.

On November 20, 1962, Documentary Books, Inc., requested an application to mail without affixed postage from the post office at Middlesex, New Jersey, through General Mailing Corporation, a mail-order house patron of the Middlesex post office. Permit No. 8 was issued on November 20, 1962. Thereafter 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were shipped from that post office.

First-class mailings of Liaison News Letter, Inc. were also mailed from the Middlesex post office.

An investigation was commenced within days after the first mailings of Eros at Middlesex, New Jersey.

Thereafter testimony was presented to a Federal Grand Jury sitting in the Eastern District of Pennsylvania, which on March 15, 1963, returned its true bill

of indictment charging petitioners in 28 counts with mailing obscene publications and advertisements for such publications, in violation of 18 U.S.C. 1461 [R. 1a, 6a-13a].

Petitioner Ralph Ginzburg was named in all 28 counts. One of the three corporate petitioners was also named with Ginzburg as a co-defendant in each of the 28 counts.

Petitioners Ralph Ginzburg and Documentary Books, Inc. were charged with three counts (Counts 1 through 3) of having caused the mailing of advertisements to two persons in Philadelphia and one person in Havertown, Pa., on November 15, November 17 and December 12, 1962, telling where an obscene book, "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony could be obtained. The same petitioners were also charged with six counts (Counts 11 through 16) of having caused the mailing of the same obscene book to six persons in Philadelphia, Pa.

The petitioners Ralph Ginzburg and Liaison News Letter, Ind. were charged with three counts (Counts 4 through 6) of having caused the mailing of advertisements on November 27, 1963 to three persons in New Hope, Pa., Havertown, Pa., and Paoli, Pa., telling where an obscene pamphlet, named "Liaison, Vol. 1, No. 1" could be obtained. The same petitioners were also charged with four counts (Counts 23 through 28) of having caused the mailing of the same obscene pamphlet, "Liaison, Vol. I, No. 1" to four persons in Philadelphia, Pa., one person in Jenkintown, Pa., and one person in Valley Forge, Pa.

Petitioners Ralph Ginzburg and Eros Magazine, Inc. were charged with four counts (Counts 7 through 10)

of having caused the mailing of advertisements on March 24, November 17, December 11, and December 18, 1962, to persons in Philadelphia, Pa., Rosemont, Pa., Chester, Pa., and Elkins Park, Pa., telling where an obscene book, named Eros, Vol. 1, No. 4, could be obtained. The same petitioners were also charged with six counts (Counts 17 through 22) of having caused the mailing of the same obscene book, Eros Vol. 1, No. 4, to five persons in Philadelphia, Pa., and one person in Gladwyne, Pa.

On April 11, 1963, petitioners filed a motion to dismiss the 18 counts of the 28-count indictment which pertained to "The Housewife's Handbook on Selective Promiscuity" and Liaison Vol. 1, No. 1 on the ground that such materials were not obscene within the meaning of 18 U.S.C. Section 1461 [R. 13a]. Copies of the book and pamphlet and advertisements referred to in the 18 counts were attached to the motion as exhibits. Annexed to the motion was an affidavit of petitioner Ralph Ginzburg [R. 14a-16a] saying that "prior hereto and in February 1962" he had written 1000 "prominent persons" asking their view on "The Housewife's Handbook" and annexing 69 replies thereto, together with a book review of the "Handbook" by William J. Bryan, Jr. M.D. appearing in the Journal of the American Institute of Hypnosis, January 1962 and a book review of the "Handbook" by Dr. Robert M. Frumkin, appearing in the Journal of Human Relations, Summer 1962, Vol. IX, page 513.

On May 8, 1963, petitioners acknowledged by stipulation that in all counts in which the three publications or the advertisements pertaining thereto were involved, they "did knowingly mail or cause to be mailed the materials set forth in those counts on the dates set forth,

fully knowing the contents of said materials." [R. 149a, 150a, 152a].

On May 17, 1963, the people's motion to strike the Ginzburg affidavit and its 69 annexed exhibits was granted. On May 23, 1963 petitioners' motion to dismiss the 18 counts of the 28-count indictment was denied [R. 151a].

On June 10, 1963, petitioners filed a waiver of trial by jury [R. 2a]. The case was tried to the court on June 10, 11, 12, 13 and 14, 1963, and the trial judge rendered his verdict on June 14, 1963.

During its case in chief, the United States of America called the postmasters of Middlesex, New Jersey, Blue Ball, Pa., and Intercourse, Pa., the postal inspector of Middlesex, New Jersey, and the editor of Liaison Vol. 1, No. 1. After introducing in evidence a copy of "The Housewife's Handbook on Selective Promiscuity," "Eros Vol. 1, No. 4" and "Liaison Vol. 1, No. 1," and the ten advertisements and their mailing envelopes, supporting Counts 1 through 10, the people rested.

In their defense, petitioners called seven witnesses: A clinical psychologist, an art critic, the author of "The Housewife's Handbook on Selective Promiscuity," a magazine editor, an attorney, a psychiatrist, and a Southern Baptist minister/family counselor. Eight books and pamphlets were introduced into evidence as examples of "hard-core pornography" and 34 magazines and paperback books were introduced into evidence as having been recently purchased in shops in New York City and Philadelphia, Pa.

In rebuttal the United States Government called three witnesses: two psychiatrists (one male and one female), and a Baptist minister/family counselor.

United States of America: Case in Chief.

Arthur J. Rodgers, Jr., the Postmaster of Blue Ball, Pa. testified as follows: In the course of his business as postmaster he had received a letter on the stationery of Eros Magazine, Inc. dated October 18, 1962, and signed by Frank R. Brady, Associate Publisher of Mr. Ginzburg, reading in part, "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." [R. 152a-155a, Ex. G-1]. The postmaster's reply was not offered in evidence, nor was there evidence presented of any mailings from the Blue Ball post office.

Miss Bertha M. Martin, the postmaster of Intercourse, Pa., testified as follows: In the course of her business as postmaster, she had received a similar letter on the stationery of Eros Magazine, Inc., dated September 4, 1962, and signed by Frank R. Brady, reading in part: "After a great deal of deliberation, we have decided that it might be advantageous for our direct mail to bear the postmark of your city. . . ." She informed the originator by letter that, because of limited facilities, the Intercourse post office would not be able to handle bulk mailings in such a volume [R. 156a-159a].

Robert W. Sanders, the postmaster of Middlesex, New Jersey, testified as follows: On August 13, 1962, petitioner Eros Magazine, Inc. of 110 West 40th Street, New York, requested an application to mail without affixed postage, through General Mailing Corporation, a mail-order house patron of Middlesex post office. Permit No. 8 was issued on the following day. Substantial bulk mailings commenced on October 7, 1962 and continued to the present time (June 10, 1963). Approximately 5,053,884 pieces of third-class bulk mail contain-

ing advertisements for Eros Magazine went out, at a mailing cost of $132,704.93. The total pieces of all classes of mail was 6,067,573 and the cost of mailing was $163,438.48.

On November 20, 1962, petitioner Documentary Books, Inc. requested an application to mail without affixed postage, through the same mail-order house patron of Middlesex post office and Permit No. 8 was issued by his post office (Middlesex) on the same date. A total of 5,543 copies of "The Housewife's Handbook on Selective Promiscuity" were received for mailing.

Liaison News Letter, Inc. also mailed first-class mailings through his post office (Middlesex).

J. Shane Creamer, the Assistant United States Attorney, placed in evidence the ten advertisements and mailing envelopes which were received through the mail, which were the basis for the first ten counts of the indictment. The exhibits were the subject of a stipulation previously filed with the Court on May 8, 1963, in which the petitioners acknowledged that they did "knowingly mail or cause to be mailed" the same "on the dates set forth, fully knowing the contents of said materials." [R. 165a, 149a, 150a, 152a].

Hugh J. McDermott, a postal inspector of Middlesex post office testified that he began investigating the case as to a violation of the postal obscenity statutes within days after the first mailings of Eros at the Middlesex post office [R. 172a].

John Willis Darr, the editor of "Liaison Vol. 1, No. 1," the pamphlet named in the indictments, testified that he had been a writer for twelve years and as such had been referred to the Eros offices in September or October of 1962, by an employment agency [R. 173a]. After an interview with Warren Boroson, he received a post card from Mr. Ginzburg inviting him to submit samples of his past work which he did. Within a week of the time that he was referred by the employment agency, he was interviewed by Mr. Ginzburg, who told him he was looking for an editor and writer for Liaison. "Liaison" was to cover the same scope as "Eros," but in a more newsworthy fashion [R. 174a]. Following this interview and at Ginzburg's request, he submitted an article called "How to Run a Successful Orgy" to their offices, which later appeared in Liaison News Letter in a revised form [R. 175a]. Later Ginzburg telephoned him and said, "When can you start to work?" [R. 177a]. He was hired at a salary of $7500 a year [R. 181a].

As editor of "Liaison" he inherited a collection of magazines, newspapers, clippings and notes which he used as research material and background for the newsletter [R. 177a]. He identified, as having been written by him, the statement of policy, appearing on page 1, the article, "Semen in the Diet," appearing on pages 4 and 5 and the article, "Sing a Song of Sex Life," appearing on pages 5 and 6 of "Liaison Vol. 1, No. 1" [R. 179a, 181a]. All of the copy for the newsletter was placed in a basket on the desk of the front office and from there it was transported up to Ginzburg's office upstairs. As a rule he would get the material back on his desk the next day.

Ginzburg gave him instructions that the last page should not contain any four-letter words. The newsletter was folded for mailing in such a manner that two-thirds of the last page was exposed to those handling

the mails [R. 179a]. As to the statement of policy, Ginzburg might have said, "It is all right" or "It is good" or something like that [R. 179a]. He had a discussion with Ginzburg about his reaction to the article, "Sing a Song of Sex Life." They discussed the line "The professors have crawled out of the dust and discovered lust" and he thought Ginzburg liked that line [R. 181a].

At the time of his termination of employment in November of 1962, he had completed five issues of "Liaison" and two had been published [R. 183a].

The Assistant United States Attorney placed in evidence a copy of "Liaison Vol. 1, No. 1" [Ex. G-16, R. 178a]. "The Housewife's Handbook on Selective Promiscuity" by Rey Anthony [Ex. G-17, R. 184a] and "Eros, Winter, 1962, Vol. 1, No. 4" [Ex. G-18, R. 185a] and rested the Government's case in chief.

Petitioners' motion for dismissal of the indictment on the ground that the Government had failed to make out a case under 18 U.S.C. Section 1461 was denied.

Ralph Ginzburg et al.'s Defense.

Dr. Charles G. McCormick, a clinical psychologist, testified that pornographic material could be described in psychological terms and gave his opinion as to what he, as a psychologist, considered to be pornography [R. 188a]. In his opinion pornographic material must "combine both the sense of pleasure and the sense of guilt or shame" in the individual [R. 188a] and that the sense of guilt or shame was a "sense of being able to engage in something that is intrinsically bad to the reader based upon whatever he had accumulated from

the air in which he grew up. . . ." [R. 189a]. He thought that most pornographic materials "are published secretly . . . without acknowledgement . . . won't even carry a title page on which the author's name is given or the publisher's name is given. There is no date . . . no commitment for responsibility behind it." And that these surreptitious factors gave the person who would read them the impression that sexual expression was evil, sex was shameful and that what the material was about was a shameful item [R. 191a]. In his opinion one of the essential building blocks of pornographic material was the distortion of reality, such as the reaction of the pre-adolescent girl to her violation in "the autobiography of the flea." Such distortion was necessary "to bring his readers' attention exclusively on attempting to absorb the guilty pleasure from the material itself." ". . . there would have to be something wrong with the person for" the pornographic material he referred to not to act as a sexual stimulant and produce sexual stimuli. ". . . he would have to be ill in some way, physically or psychologically." [R. 193a].

In his opinion, while under certain circumstances, the view of an attractive nude woman could erotically stimulate an average male and such erotic response would be felt and experienced by the individual exactly the same as for pornographic material [R. 194a], the stimuli of shame which accompanied pornography would not be produced in the viewer nor would he have an itching or a morbid or a licentious sexual arousal unless the person were pathological [R. 195a] or "the publication were designed to do this, but under ordinary circumstances where the publication were a responsible one, there would be no reason to expect this to be so."

In his opinion, a person would have to be extremely exhibitionistic (pathological) not to feel uncomfortable about having his neighbor see him reading the material which he considered as pornographic.

". . . in presenting the examples of the type of material which Dr. McCormick has testified to . . ." [R. 201a] Sidney Dickstein, the defense counsel, placed in evidence eight books and pamphlets: "A Small Pig" booklet [Ex. D-1], a pamphlet, "John Dillinger in a Hasty Exit" [Ex. D-2], a pamphlet, "Mr. Bregar is Sold on TV" [Ex. D-3], a booklet, "Dagwood Has a Family Party Let's Go" [Ex. D-4], a pamphlet, "Secrets Will Out" [Ex. D-5], a book, "The Oxford Professor" [Ex. D-6], a book, "The Autobiography of a Flea" [Ex. D-7], and a book, "Devil's Advocate" [Ex. D-8]. Dr. McCormick testified that the effect of such materials on the average person would "be one of revulsion, and one of being assaulted." "In other words, it is actually destructive for the individual, the ordinary individual to read that kind of material because he doesn't have the emotional base and he doesn't have the capacity for keeping context. . . ."

Dr. McCormick testified that he had read "Lady Chatterley's Lover." It was his opinion that while Exhibits D-1 through D-8 and "Lady Chatterley's Lover" were all sexually stimulating, the impact on the system of the ordinary individual was radically different. He said "There is context. The reality setting, the reality factors, the complications, the responsibilities of the author, the attitude of the author as he presents the material. . . ." [R. 203a]. In "Lady Chatterley's Lover" there "is a responsibility in the sense that the actual presentation by the author gives you reality situations rather well. . . ." [R. 204a].

Dr. McCormick testified that he was acquainted with "Lolita" by Nabakov. It was his opinion that the subject matter and themes of "Oxford Professor" (one incident of which involved the seduction of an immature girl) and "Autobiography of the Flea" and "Lolita" (the story of the seduction of a pre-adolescent by an established psychotic individual) were identical, but the books were "different" in the way in which they dealt with the similar subject matter. The difference was reality. "Lolita" was psychologically sound. The author makes the reader appreciate the fact that "this is one individual's distortion, but a reality of distortion" [R. 205a].

Dr. McCormick testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion the predominant effect of this material was not to create in an average person an itching, morbid or shameful desire or longing with respect to sex [R. 206a]. In his opinion the book was not morbid, nor did it tend to corrode and turn the reader against himself in the process of reading [R. 210a], as was the case with pornographic material. It gave a realistic picture of a woman's attitude and activities with respect to sex [R. 210a]. It would not produce a guilty feeling in the individual because it was supported by a responsible attitude on the part of the author. A reader will feel informed rather than guilty after having read it [R. 211a].

Dr. McCormick had read "Eros Vol. 1, No. 4" and was of the opinion that the predominant effect would not create in the average person an itching or morbid or shameful desire or longing with respect to sex. He thought that there were a couple of passages in Eros

that would be erotically stimulating to an average person reading it, such as in the article by Frank Harris [R. 212a] and the article by the Kronhausens [R. 213a] and that they would not stimulate in the average person a morbid or unhealthy attitude toward sex, because of the reality context that the author, wto is quoted, maintains. "While erotically stimulating, it is not pathological" [R. 214a].

Dr. McCormick had read "Liaison Vol. 1, No. 1" and was of the opinion that the predominant effect of it would not create in the average person an itching, morbid or shameful desire or longing with respect to sex, nor would it be erotically stimulating [R. 215a]. He was of the opinion that one who was already perverted (a paraphiliac) would be sexually stimulated because of psychic distortions [R. 215a]. While both the article by Dr. Albert Ellis and the article "Semen in the Diet" had the tone of an assault on the reader, neither one would have any erotic effect because they lacked any established association with the reader [R. 216a].

Dr. McCormick was of the opinion "The Housewife's Handbook" would be quite useful as an educational instrument [R. 216a]. It gave a realistic portrayal of the evolution of sexual awareness and sexual expression of "an ordinary everyday person with the natural emotional and intellectual limitations who had to grope . . . through just like everyone else has to grope his way through toward some kind of sexual adjustment. . . ." He considered it a valuable instrument for a person who was looking for sexual education. He thought the book would be useful under supervision. The restriction was imposed for the purpose of guiding the person in making distinctions "where the layman in reading it

would not be able to distinguish those aspects hat were the individual's own problems and those aspects of the material that were a natural universal problem of getting educated." [R. 217a].

The Assistant United States Attorney did not cross-examine Dr. McCormick.

Horst W. Janson, an art critic, testified as to the origin of the etchings, engravings and woodcuts appearing in "Eros Vol. 1, No. 4" at pages 2, 6, 7, 8, 9, 10, 11, 12, 13 and 81 [R. 219a-220a]. He thought the photographs on page *73 et seq.* in the essay entitled "Black and White in Color" were "outstanding, beautifully and artistic photographs." The photographer had an "extraordinary sense of form and composition" [R. 221a]. He saw the "symbolic expression of blending together of the equivalence of the two people represented," so familiar in certain British postage stamps, used as an artistic compositional device, in the first photograph depicting the Caucasian female's facial profile superimposed on the Negro male's profile, in the full page photograph of the two eyes, and in the final full page photograph depicting the full length nude Negro male and nude Caucasian female in an amorous embrace. He was of the opinion that in terms of material and graphic layout and taste displayed in presenting the material, Eros was the equal of any magazine being published today [R. 222a].

The Assistant United States Attorney did not cross-examine Mr. Janson.

Lillian Maxine Serett, the author of "The Housewife's Handbook on Selective Promiscuity," testified that she started writing the book 15 years ago and finished it three years ago. She had gone into the printing

business two years prior to finishing the book and had printed it herself under the title "The Housewife's Handbook for Promiscuity" and the printing label, Seymour Press [R. 223a]. The edition published by Documentary Books, Inc. had the same textual matter as her edition [R. 224a] which she originally published in August and September of 1960. A reprint with an introduction by Dr. Ellis was mailed out to doctors, psychologists, and college professors who were heads of psychology departments. Approximately 400,000 brochures were mailed since October, 1960 and a little over 12,000 copies had been sold [R. 225a].

She stated that the Kinsey Reports confirmed her belief that woman's role in sex was widely misunderstood and that she hoped her book, written in a layman's language, could communicate to women that the sexual activities and attitudes they have are not unusual or unique, that various forms of sexual expression are normal and healthy things to do and that women do have sexual rights [R. 226a].

The Assistant United States Attorney did not cross-examine Mrs. Serett.

Dwight MacDonald, a magazine editor and literary film critic, testified that he reads about 200 books a year or about five a week. He had seen a change or movement in the permissible limits of sexual candor in our literature, especially in the last five or six years [R. 230a]. That "Fanny Hill," which had always been regarded as "hardcore pornography" should be published was extremely significant in his judgment, as was the publication of "Tropic of Cancer" and "Naked Lunch," "which is an extremely, really a sick book" [R. 231a].

He recalled that six or seven years ago the models in girlie magazines had to wear brassieres, whereas now they can expose their bosoms, although "they can't be actually nude from the front anyway, but that will perhaps come." In the movie industry of the 20's, one could not show two people living together who were not married, nor could they show a husband and wife in a single bed [R. 234a]. Now it was possible to show rape, prostitution, and explicit scenes of sexual intercourse [R. 235a].

Dwight MacDonald testified that he had read "The Housewife's Handbook on Selective Promiscuity" and that in his opinion, "Speaking as a long-time student of mass culture in American society" he would say that it did not go substantially beyond the customary limits of candor that American society permits in its literature at this time." He thought that it was not a particularly interesting book, that it had no literary value, and that its only importance would be as case history for doctors. In comparing it with "Lady Chatterley's Lover," he thought the latter a work of literary art, whereas "The Housewife's Handbook" was not [R. 236a].

He was of the opinion that "Liaison Vol. 1. No. 1" was "an extremely tasteless, vulgar and repulsive issue" but that it did not go substantially beyond the customary limits of candor we tolerate in discussion of sexual matters and that he did not think it obscene or pornographic [R. 237a].

He was of the opinion that "Eros Vol. 1. No. 4" did not go substantially beyond the customary limits of candor which we in this country now tolerate and accept [R. 238a]. He was of the opinion that the following articles had significance or note for some literary merit: "Love in the Bible," "Jewel Box Review," "Let-

ters from Allen Ginsberg," "Was Shakespeare a Homo?" "New Twists on Three Great Trysts," "The Natural Superiority of Women as Erotisists," "Black and White in Color," and "Lysystrata." [R. 239a]. He thought there were a considerable number of articles that had either trivial or poor literary merit and at least one, "Bawdy Limericks," had no merit and was quite vulgar. Nevertheless, he did not think them obscene or pornographic [R. 240a].

The Assistant United States Attorney did not cross-examine Mr. MacDonald.

Sidney Dickstein, the defense counsel, placed in evidence a copy of "Memoirs of a Woman of Pleasure" by John Cleland [Ex. G-9] as having been discussed by Dwight MacDonald.

Arthur J. Galligan, the law partner of the defense counsel, testified that he had visited several stores in New York City in the vicinity of 6th and 42nd Street and in Philadelphia, Pa., in the vicinity of 15th and Market and had made numerous purchases of paperback books, girlie and nudist magazines. The following of his purchases were placed in evidence as Exhibits D-10 through D-43* [R. 243a-256a]:

D-10 Waterfront Blonde
D-11 Rogue Magazine
D-12 Gang Girl

*Gang Girl and Wild Body held obscene in *Chi. v. Wood*, 63 M.C. 156720; Nymph #4 held obscene in *Chi. v. Charles Kimmel*, 63 M.C. 190116; Pastime, Vol. 2, No. 4, held obscene in *Chi. v. Westbery*, 63 M.C. 104281; Adam, Vol. 7, No. 6, held obscene in *Chi. v. Soden*, 63 M.C. 155883; Escapade, April 1964, held obscene in *Chi. v. Dahlia*, 64 M.C. 127005; Snap, Vol. 4, No. 2, and Tip Top, Vol. 3, No. 6, were subjects of federal obscenity indictments in *United States v. Milton Luros et al.* (trial date Oct. 18, 1965); Gymnos, Oct. 1963, held obscene in *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); see also other paperback books, girlie magazines and nudist magazines which have run afoul of the law as tabulated in CDL Commentaries, Vol. 1, No. 2 (Nov. 1965). This problem of comparables is analyzed in *United States v. West Coast News Co., et al.*, 228 F. Supp. 171, 191.

D-13 The Sucker
D-14 Pushover
D-15 Rock-N-Roll Gal
D-16 They Couldn't Say No
D-17 Wild Body
D 18 Nymph Issue No. 5
D-19 Tic Toc Vol. 1 No. 2
D-20 Pastime Vol. 2 No. 5
D-21 Adam Vol. 7 No. 6
D-22 Satan's Scrapbook Vol. 1 No. 1
D-23 Kiss No. 2
D-24 Stark Vol. 1 No. 1
D-25 French Frills Vol. 2 No. 5
D-26 Hip and Toe Vol. 1 No. 2
D-27 Vue, July Issue
D-28 Photo Button, Series 7
D-29 Treasure Box Review, Series 18
D-30 Treasure Box Review, Series 19
D-31 Tip Top Vol. 2 No. 6
D 32 Snap Vol. 3 No. 2
D-33 Twilight No. 3
D-34 Zoftick Vol. 2 No. 1
D-34 Ruby Vol. 1 No. 1
D-36 Torch Vol. 2 No. 1
D-37 Nude Word Issue No. 6
D-38 Gymnos July 1963
D-39 The Wrong Turn, and Season of Love
D-40 Escapade, August Issue
D-41 Cavalcade, August 1963
D-42 Scamp, September
D-43 M R Spring 1962

Dr. Peter G. Bennett, a psychiatrist, was asked to define pornography in psychiatric terms. He stated his opinion that pornography was more than an intense stimulation of erotic feelings, which in itself was not harmful or disturbing to the ordinary mature adult. Pornography had, in addition to the erotic stimulation, a disturbing disintegrative influence even on the mature person which is almost impossible to resist and which abrades the conscience, causing morbid feelings of shame and guilt [R. 260a]. He stated that the average well-adjusted person's deep-seated guilt and shame about some aspects of sex as a result of his early education or lack of it will disappear as the person allows himself to become better acquainted with the subject, and that the anxiety, caused by sexual realism, may even be turned to a fuller enjoyment of life 'as I think might happen to many as a result of reading "The House-Wife's handbook." In his opinion, the characteristic of the mind which was primarily attacked by pornography was its narcotic appeal to the remnant of infantile narcissism which is present in every-one—the selfish wish for total satisfaction without regard for people or responsibility which is characteristic of the newborn child [R. 262a]. Pornography forcibly stimulates intense narcissistic fantasy by portraying orgiastic sexual and sadistic satisfaction in the most compelling and unreal way. "The narcissistic impulses cause a morbid sense of shame and a desire to regress to infancy to some extent even in the well-adjusted mature adult, whereas erotic realism only causes an erotic stimulation without regression for which the aforementioned individual would feel no shame or guilt." [R. 263a].

Dr. Bennett testified that the reading of "The Housewife's Handbook" by a mature person who is not mentally ill would not have the effect upon his psyche that he attributed to pornographic material [R. 264a].

He testified that he had read "Eros Vol. 1, No. 4" and that a reading of this volume by an average person would not have the same effect as the reading of the pornographic material which he had described. He thought the predominant effect of some of the articles was sexually stimulating and others was not [R. 265a].

He was of the opinion that there was nothing in Liaison Vol. 1, No. 1 that would sexually stimulate an average individual or create morbid or shameful or licentious thoughts [R. 266a].

On cross-examination by the Assistant United States Attorney, he stated that the intent of the person producing the material was not a factor in his psychiatric definition of pornography. It was his opinion that what the American society as a whole understood to be pornographic, *i.e.*, persons who write things that stimulate sexual curiousity violently for purposes of financial gain, was not his psychiatric definition of pornography [R. 268a].

The trial judge asked Dr. Bennett if the acts of sodomy performed by Dr. Adler on the author as described at page 207 would have any shameful effect on the average reader. Dr. Bennett replied that it would not in the mature person [R. 271a]. The court inquired whether those paragraphs "would suggest to a boy or girl near 21 years of age ways (sodomy) of having sexual intercourse in order to have greater satisfaction" and Dr. Bennett answered, Yes, and that it would be permissible in his opinion. The court asked if Dr. Bennett was speaking of mental or sexual maturity and Bennett re-

plied he was talking of emotional maturity. Dr. Bennett said that he thought that the average 14-year old would not be disturbed by reading such material. The Judge asked if they read this, would they try to do this in order to have greater sexual satisfaction. Dr. Bennett said, no, not at that age. The Judge called his attention to the paragraph preceding the act of sodomy (where Dr. Adler tells the author that her husband was sick, when he said that there were more important things than sex etc.) and asked him if that would have any shameful effect on a reader or suggest a moral code that it was all right to have sexual relations with one not your spouse. Dr. Bennett agreed that was the author's opinion but stated it would not create any shameful effects. He was of the opinion that "A reader who is old enough to wade through this book—and by that I mean 12, 13, 14—would recognize that this is the author's opinion but not necessarily the moral code or the code of society."

George Von Hilsheimer, III, a Southern Baptist minister, who was trained in psychology and had done some counseling and therapy with the underprivileged in both urban and rural areas, testified to the attitudes toward sex held by Christian groups and to certain changes that have recently occurred [R. 281a].

He said that he first saw 'The Housewife's Handbook" in 1960 when one of his colleagues gave him a copy. He had used it since in his pastoral counseling and in his psychological counseling with married women who have a sense of shame, as a means of ventilating that sense of shame [R. 289a]. He was of the opinion that it teaches them their own sexual failures are not unusual [R. 290a]. "We have an almost idolotrous con-

cept of marriage in our country. Little girls are told practically from the moment of birth that this is the one road to happiness and almost to salvation. They are told that somehow a mystical magical experience is going to occur with this marriage that was made in heaven, which is a heretical theological notion in itself. They will meet the man of their dreams, he will be perfect for them, they will marry and things will be lovely and beautiful thereafter. They are told this by comic books, by television, by movies, by every possible medium of public culture. They are told a lie. They are told a myth . . . Now it is necessary for the pastoral counselor and for the psychologist if he is going to be responsible to his youth and to his parents to give them a more realistic view of the world in which they live and the problems that they are going to face and to fit them with the practical, detailed, immediate, realistic and unshamefully communicated knowledge about the things which are most important to them. This to me is the great value of this book. It says, 'you are not alone. This is the experience of many, many people,' and it gives a certain amount of hopefulness to it. It is in my mind theologically quite an innocent book. . . ." [R. 291a]. In his opinion the book was a straightforward recount of a fairly unhappy history of a fairly typical woman and was not drawn far from the average middle American experience. Although he thought the standard marriage manuals helpful, the language was too complicated [R. 292a].

On cross-examination by the Assistant United States Attorney he indicated he did not use the book as a blueprint for what one was supposed to do but used it as a means of ventilating a sense of shame [R. 294a]. It's main value was that it discussed in quite simple

terms things which were not ordinarily discussed. He said he would give the book to the person being counseled with a comment, "If you think you have difficulties . . . then look at the book in this way and see what it has to teach you." He did not supervise since he believed that people can read freely and have the ability to solve their own problems without his intimate and daily guidance." [R. 295a].

The trial judge asked if it was the kind of a book that he would like to have in the library of his home if he had a 14, 15 or 16-year old son or daughter. The Reverend replied that it was in his library at home and that his wife and the teenage children in his parish read it [R. 296a]. The Judge asked him if, in his opinion, the things discussed related to matters of sexual perversion [R. 296a]. The Reverend replied that the kinds of relationships the author describes were not commonly held by psychologists as perversions, but whether or not this is true, such was a "part of these children's lives, the material that is freely available to them is the hard-core pornography, shamefully discussing lewd, prurient kinds of garbage. . . ." "This kind of book in the setting of a person they trust and respect who has said. 'Read it, We will discuss it' will form the relationship of a new kind of understanding." "If I am to work effectively with them I must have means to read, of talk, or give them to read that with ease they can talk about things they do know about in a distorted way, and then we can talk about what is the kind of relationship you should have and I should have, and the proper kind of relationship." [R. 297a].

The Court asked: "How about the person who reads the book and doesn't have the reverend to go to talk

to him about it and believes this is a code of morals that should be followed as set forth in this book?" The Reverend answered: "This is one of the difficulties to me of pornography." [R. 297a]. The Reverend did not think any person, particularly a teenager, reading the book was going to be convinced that adultery was a proper way of life [R. 298a]. He thought the book would be read "in the context of what kids and adults are saying to each other." [R. 300a].

Asked by the Judge if he thought that wide circulation of the book would be perfectly all right, he said that he thought it would serve as a ventilation from all the kinds of horrible trash that was freely available, the books on any newsstand which show sodomy, lesbianism, homosexuality and adultery freely practiced [R. 305a]. Asked by the Judge if such wasn't in this, book, he replied: "But dealt with in an unshameful way, a dry way, a straight forward way." [R. 305a], He said that he worked with children "whose common expression is a four-letter expression. This is their form of greeting and this is common and extending in our culture. I work with adults whose common form of recreation is the telling of dirty and sometimes obscene and pornographic stories" and that the book has "a tremendous value in this kind of counseling." [R. 307a].

Asked by the Trial Judge whether he would approve of the methods of sexual relationship set forth in the book (sodomy) the Reverend replied, "No, I would say again that the intimate relationships of a loving couple in marriage, so long as they have developed naturally and with regard for the integrity of one another, that there is no such thing as perversion." The Judge then asked him to read the passages on pages 207 describing

the sodomy act and asked him the question with regard to the relationship that is there (between the female author and the male doctor, unmarried). The Reverend replied, "I repeat, this was not described—so long as it is in the boundaries I have stated—this does not describe a perversion and it describes a kind of sexual relationship which is generally regarded as quite permissible and proper so long as it is within the right framework." [R. 311a.]

The defense rested its case.

United States of America: Rebuttal.

The United States Government called three witnesses, two psychiatrists and one minister. It was stipulated that their testimony was to be considered for rebuttal purposes only [R. 335a].

Dr. Nicholas George Frignito, a psychiatrist, testified that in his opinion "The Handbook" had no medical value, because it gave a distorted viewpoint of the sexual behavior of women and the type of behavior that is prevalent in our community, that it fosters sexual perversity and implies adultery, fornication and sexual perversion are all right [R. 320a].

In his opinion it was a danger to the majority but was not a threat to professional people who had training and knowledge in this sort of business [R. 321a]. This type of material would be dangerous for an adult boy in that it encourages all types of sexual behaviors such as masturbation and increases sexual promiscuity [R. 322a]. It would incite the average 14-year old to sexual misconduct [R. 323a] and lead to "self abuse, masturbation and that would lead to other types of sexual activity" [R. 324a]. As to the average adult person it

would stimulate his prurient interest and certainly would mislead him into believing that such was acceptable behavior in our community. The prurient interest he referred to was "the stimulation by writing or pornographic books to sexual misconduct or instilling lustful feelings" [R. 324a].

Asked on cross-examination by the defense counsel whether the authoress' view toward sexual practice was widely held by other commentators on sex, he answered, "I don't know the exact number, but those men that I associate with rather closely do not hold to this type of sexual behiavior. I would say that the majority of psychiatrists that I am in contact with do not approve of say abnormal, aberrant sexual acts." [R. 327a].

Dr. Ann Hankins Ford, a psychiatrist, testified that she had read "The Housewife's Handbook," and that in her opinion it had no medical value. In the field of psychiatry in which she was involved (disturbed persons) it would be a destructive book [R. 337a, 339a]. In her opinion the authoress was emotionally very immature, a very disturbed person, who had not progressed emotionally from the age of childhood when people are in a normal homosexual stage [R. 337a]. Asked if the book had any medical message to it, she replied the only message she found in the book was "if you are dissatisfied with your husband look around and get some other man" [R. 338a]. "The clitoris is a remnant of the male penis from fetal development and this is so emphasized in this book, it is the only penis this woman has, and she all but works it to death. She must have this recognized. She must have great male attention paid to her substitute penis, and in this way she is not

making love to the men. This is not a lovers' relationship; it is a matter of demeaning, sullying these men whom she comes in contact with." [R. 338a]. The author is so confused and far from understanding what her problem is that it would reinforce the anguish and feelings of hostility" that patients in a similar situation had [R. 338a]. It would not have any value in the treatment or counseling of her patients but would be more disturbing to them [R. 338a].

Reverend Adolph Emil Kannwischer, a Baptist minister and Professor of Psychology, testified that he would not use the "Housewife's Handbook" in counseling parishoners or people because he regarded it was detrimental to a person who already was having problems. He saw no positive value in it [R. 344a].

The United States Government rested its case.

The Assistant United States Attorney's motion to strike Exhibits D-1 through D-43 and the testimony of the expert witnesses regarding responses of the average person and community standards was refused [R. 347a].

The defense attorney's motion for a judgment of acquittal was refused [R. 348a].

The trial judge found the defendants guilty on all counts. The trial court's opinion appears at R. 355a and in *United States v. Ralph Ginzburg et al.*, 224 F. Supp. 129 (Nov. 21, 1963). On December 19, 1963, the trial judge sentenced petitioner Ginzburg to five years' imprisonment and a fine of $28,000. and fined the corporate defendants $500 on each count [R. 373a-376a]. (A notice of appeal was filed on the same day). [R. 380a].

The United States Court of Appeals, Third Circuit, affirmed the judgment of the District Court in *United States v. Ralph Ginzburg et al.*, 338 F. 2d 12 (Nov. 6, 1964). This opinion appears at R. 385a.

Summary of Argument.

I.

The public policy of the United States Supreme Court has always championed the obscenity laws. Yet with all of this case law support, the communities are being inundated by a horde of obscenity which the law is not reaching.

The prosecutors are claiming that they have no remedy and that the Supreme Court stands too eager to reverse their successes, when they occur. *Amicus* do not picture this to be the true situation.

This Court recognizes that the debasement of sex has been with mankind down through the centuries and that the obscenity laws are necessary for a strong community life. The *Roth-Alberts* decision is testimony of the fact that criminal penalties are authorized procedures to regulate this type of conduct.

Most of the recent cases before this Court since 1957 have involved "previous restraint" controls, such as movie licensing cases, search warrant procedures, the right of the postmaster to refuse mail on the grounds it is obscene, etc. Whereas an earlier Court in *Near v. Minnesota* had indicated "previous restraint" could clearly be employed against obscene materials, this modern Court has restricted that interpretation considerably by procedural rules. In doing so, a number of obscenity judgments were reversed on procedural grounds, making it appear that this Court was releasing the matter as

not being obscene. Such decisions have misled and discouraged prosecutors.

In several cases the justices have been unable to agree on an "Opinion of the Court." The theories of the case set forth by the individual justices do not lead to an orderly understanding of the law.

On the other hand, this Court has denied review in at least 21 criminal cases which have come before it since 1957. These cases were without opinion and have not been publicized. They are not generally known to the individual prosecutors, who lose heart when they see all losses and no victories.

Then too, some prosecutors do not recognize the distinction between criminal prosecutions and previous restraint cases. A favorable written opinion confirming the trial court's findings in this criminal case is essential to the people's cause if we are to break the stalemate. The prosecutors need a direct signal from the Court, that they can retain their victories in criminal cases.

II.

Petitioners waived a jury at the outset and placed their fate in the hands of the trial judge. They should not be allowed to argue on appeal issues which would not have been available to them had a jury tried the matter.

The trial judge was receptive to all that the petitioners had to offer in the way of evidence. He was not required to accept their theory of the case, in view of

the subject matter and conduct of the petitioners, which spoke for itself.

If this Court, in its decision in *Roth-Alberts* actually passed upon the obscenity *vel non* of such subject matter, that case should be controlling here, because of the similarity of the material and operations of the petitioners.

The trial court properly followed the *Roth* standards in holding petitioners' three publications obscene. Evidence of the purpose of the publisher in regard to one publication is probative as to his purpose in the other two, as a common scheme or plan.

Redeeming social value is not determined in a vacuum, but depends upon all of the circumstances. The variable nature of obscenity requires this. The obscene portions of the material must be balanced against its affirmative values in determining the predominant appeal taken as a whole.

ARGUMENT.

I.

An Integrated Review of the Obscenity Case Law.

A. Public Policy.

The public policy of this Court has always championed the obscenity laws. See *Rosen v. U. S.*, 161 U.S. 606 (1896),[1] decided by the U.S. Supreme Court at the turn of the century. This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal[2] by tolerating anything which tends to debase public morals.

---

[1]Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint (referred to by the court as "the record"), he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

His Massachusetts reference was the first recorded case in the United States against a book, *Commonwealth v. Holmes*, (1821). The book in the Massachusetts case was "Fanny Hill," a century and a half later to find its way before this Court in *A Book Names "John Cleland's Memoirs of A Woman of Pleasure" v. Attorney General of Massachusetts*, October Term, No. 368.

[2]Webster's Collegiate Dictionary, Fifth Edition, defines "scandal" as "The distressing effect on others of unseemly or unrighteous conduct; especially, an occasion of another's lapse in faith or morals as to give scandal to one's children . . . 3. That which offends established moral conceptions or disgraces all who are associated or involved." Tolerance of indecency, for any reason, even for purposes of administration, had the undesirable effect of giving notoriety and acceptance to the material and dignifying its appearance.

Less than 35 ears ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931)[3] the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

---

[3]"The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.*" (Our emphasis.)

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed 919 (1952) agreed with the *Chaplinsky Court*, adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California*, 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed 2d, 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinski v. New Hampshire (supra),* and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinski* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

Under such a regime, it did appear as though the communities had the proper defense mechanisms and the modern assault on public morality could easily be turned back.

Yet with all this unanimity, elegance of language, and profuseness of citation to buttress the foundations of our anti-obscenity fortresses, the stockades are presently in danger of collapsing for lack of riflemen, abetted by confusion. The communities of this nation, eight years later, find themselves with a horde of filth, printed, visual, vocal and otherwise, of unprecedented force, threatening to erode the very foundations of the basic morality upon which our nation and our Constitution were founded.[4] In the face of this peril the public prose-

---

[4] "A tide of printed filth is advancing across the land in a way which should give every wholesome-thinking person cause to wonder whether it may not erode the very foundations of the basic morality upon which our nation and our Constitution were founded.

In bookstores, railroad stations, air terminals, drug stores, everywhere that print is displayed and pictures revealed, there stand pyramids of smut, pornography and obscenity contaminating the very air in which they rest. Language which would be too raw and grating for the dives of opium-smoking debauchees degrades and defaces the paper which carries it.

Magazines with pictures and sketches that would disgrace oriental harems are sold to children as if they were as innocuous as bags of popcorn. Exotic rites that would bring the blush of shame to the faces of the most primitive tribes are described with nonchalance in high-priced books, medium-priced books, and low-priced books. Themes which should be the subject only for clinical studies in the hospitals for the criminal insane are turned into scarifying stories which are bound to bring harm to the youths into whose hands they fall.

Acts of degeneracy and unnatural conduct are being portrayed in contemporary literature as if they were normal and accepted practice in civilized life. Adultery and every other type of illegal and sinful conduct is being depicted glamorously, as if calling for emulation.

The healthful, romantic, and poetic relationship between man and woman is being treated in the basest and most animalistic terms.

Under the false guise of instruction and knowledge, so-called manuals on marriage are being turned out in myriads of copies for the sole purpose of appealing to prurient and lascivious minds. The sick outpourings of degenerate brains are being bound in hardback books and paperback books and sometimes in elegant and expensive leather. Titles and cover pictures which in themselves

cutor bleats that he has no remedy and that it is useless to prosecute, since the Supreme Court will reverse the jury's findings.

CDL is at complete odds with such ideology. Unlike our knowledge of outer space, which is increasing in geometric proportions through discoveries in space explorations, our knowledge of sex is profound, for sex has been with us since the beginning of mankind. As to the sexual relation, it can be said, with some degree of truth, that there is "nothing new under the sun." Similarly, the assault which has as its objective the debasement of sex has been with mankind down through the centuries. That which motivates the pornographer, in 1965, motivated John Cleland two centuries earlier. Recognition of the universal need for strong community

---

are suggestive, pornographic, indecent and obscene shout their vulgarity to passersby.

It used to be that pornographic literature, to the extent that it existed, was sold clandestinely. The secrecy and the furtiveness with which it was sold and circulated was an indication that the public looked upon it as something improper and not in consonance with the morals of the community. But now the most salacious books, the most degrading publications are sold in book stores, drug stores, five and ten cent stores, and at the newsstands. It is difficult to think of a place where print appears that one's eyes and spirit will not be assailed by pornography of the vilest character.

In short, a wide river of filth is sweeping across the nation, befouling its shores and spreading over the land its nauseating stench. But, what is most disturbing of all, is that persons, whose noses should be particularly sensitive to this olfactory assault, do not smell it at all. I refer to district attorneys and prosecuting officers throughout the nation. Of course, there are a large number of district attorneys in the country who are doing their duty and doing it well, but a larger number of prosecuting officials are shrugging unconcerned shoulders at this violent assault on law, morality and decency."

. . . From an address given by Associate Justice Michael A. Musmanno of the Pennsylvania Supreme Court at the Waldorf-Astoria New York City on October 23, 1965.

controls in this modern era has amply been witnessed by this Court in *Roth-Alberts* when it said at page 484:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1942 to 1956. . . ."

Nevertheless, there is, in our opinion, a crisis facing this nation which requires the members of this Court to bear witness through concrete action and to drive home, once and for all, the basic fact, which is escaping so many at the present time, that this Court really has not, in its decisions since *Roth-Alberts* underwritten the sale of "perversion for profit."

If we understand correctly what has occurred in the ensuing years since *Roth-Alberts*, this Court has not altered the basic position taken by it in those cases; namely that criminal cases which applied the proper standard for judging obscenity, did not offend constitutional privileges. This Court held at page 492:

> "In summary then, we hold *that these statutes, applied according to the proper standards for judging obscenity, do not offend constitutional safeguards against convictions* based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . ." (Our emphasis).

B. The Problem of Previous Restraint Cases.

Unfortunately, a line of cases followed which enjoyed in common the element of previous restraint,[5] a factor not present in the *Roth* and *Alberts* cases, which authorized criminal penalties as the just consequences of the defendants' temerous conduct. This Court did not react as favorably to this new issue as the earlier Courts in *Near v. Minnesota (supra)* which had *excluded previous restraint controls* in the case of *obscene publications from the operation of the Blackstone rule,* which held that:

"The liberty of the press is indeed essential to the

[5]Previous (prior) restraint was a major issue in each of the following: *Times Film Corporation v. City of Chicago,* 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72 (1957) (Movie license—no opinion), reversing 244 F. 2d 432 (7th Cir. 1957) and 139 F. Supp. 837 (1956); *Mounce v. U. S.,* 355 U.S. 180, 2 L. Ed. 2d 187 (1957) (customs case—no opinion), reversing 247 F. 2d 148 (9th Cir. 1957) and 134 F. Supp. 490 (1955); *One Inc. v. Olesen,* 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 241 F. 2d 772 (9th Cir. 1957); *Sunshine Book Co. v. Summerfield,* 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352 (1958) (right to deposit mail—no opinion) reversing 249 F. 2d 114 (D.C. Circuit 1957) and 128 F. Supp. 564 (1955); *Times Film Corp. v. City of Chicago,* 365 U.S. 43, 81 S. Ct. 391, 5 L. Ed. 2d 403 (Jan. 23, 1961) (movie license) reversing 272 F. 2d 90 (7th Cir. 1959) and 180 F. Supp. 843 (1959); *Marcus v. Kansas City Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (June 19, 1961) (Seizure), reversing 344 S.W. 2d 119 (1960); *Manual Enterprises Inc. v. Day,* 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (June 25, 1962) (right to deposit mail), reversing 289 F. 2d 455 (D.C. Circuit 1961) *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (Feb. 18, 1963) (Warnings) reversing 176 A. 2d 393; *A Quantity of Books v. Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (June 22, 1964) (Seizure), reversing 191 Kan. 13, 379 P. 2d 254 (1963); *Freeman v. Maryland,* 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (Mar. 1, 1965) (Movie license), reversing 233 Md. 458, 197 A. 2d 232 (1964); *Trans-Lux Distributing Corp. v. Board of Regents of the University of New York,* 380 U.S. 259, 85 S. Ct. 952, 13 L. Ed. 2d 959 (1965) (movie license—no opinion).

> nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity" 4 Bl. Com. 151, 152.

The cloud of confusion which was to appear was forecase in *Kingsley Book Inc. v. Brown,* 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (June 24, 1957), decided on the same day with *Roth-Alberts.* In that case, this Court split five-to-four in approving the New York injunctive action, which authorized limited previous restraint. It was here that Justice Brennan and Warren parted company with the majority in the *Roth* and the earlier Courts.

The confusion and disruption commenced one year later with the *per curiam* reversals without opinion in the *Times Film Corporation, One Inc.,* and *Sunshine Book Co.* cases[6] (cited in footnote 5). Later written

[6]For example, the claim is widespread that Sunshine Book Company stands for the proposition that nudist magazines are not obscene, no matter what may be the publisher's or disseminator's intent, the format, method of distribution, policy of the state etc. See here the recent result in *Connecticut v. Martin et al.* (June 17, 1965), where the Appellate Division of the Circuit Court reversed (2-1) an extremely well reasoned trial court opinion, solely upon the basis of the *Sunshine Book Co.* case. We believe such claim to be utterly groundless. See *Outdoor American Corporation v. City of Philadelphia,* 333 F. 2d 1963 (June 30, 1964) certiorari denied 85 S. Ct. 192, 13 L. Ed. 2d 176 (Nov. 9, 1964); *Luros v. Hanson,* petition for certiorari filed Sept. 27, 1965, Oct. Term, 1965 No. 620; *Hadley v. Arkansas,* 205 Ark. 1027, 172 S.W. 2d 237 (1943); *King v. Commonwealth,* 233 S.W. 2d 522 (Oct. 20, 1950); *Missouri v. Becker,* 364 Mo. 1079, 272 S.W. 2d 283 (1954), cited with approval in

opinions in *Marcus, Manual Enterprises, Inc.* and *A Quantity of Books* gave specific recognition to the fact that the obscenity issue was not reached in this Court's reversals of those lower Court judgments on previous restraint grounds. What factor the previous restraint element played in the 1958 decisions will never be known.[7] Subsequent opinions have revealed a common disagreement between the justices on what constitutes the vital phase of the case. See the No Clear Majority Decisions, *infra*. Then too, the Court's membership has changed.[8]

As breeding grounds, the 1958 *per curiam reversals* acted with catalytic action to spawn the "hard core pornography" rule in one of the major centers of pornopraphic production in the United States. *New York v. Richmond County News Co.*, 175 N.E. 2d 681 (May 25,

Roth-Alberts at footnote 26; *Sunshine Publishing Co. v. George N. Parris* (unreported, Circuit Court, Macomb County April 29, 1963); *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 (Mar. 13, 1964); *Dale Book Co. v. Leary*, 233 F. Supp. 754 (Aug. 12, 1964); *City of Phoenix v. Fine* (unreported, Superior Court Maricopa County, Arizona (Jan. 22, 1965); *Missouri v. Vollmar*, 389 S.W. 2d 20 (Mar. 8, 1965); *Virginia v. Dave Rosenbloom* (unreported, Suffolk County, Richmond, Virginia, June 10, 1965); *Arizona v. Arizona Magazine Distributors Inc.* (unreported, West Phoenix Justice Court, Maricopa County, (Aug. 26, 1965); *Arizona v. Al Sacks* (unreported, West Phoenix Justice Court, Maricopa County (Sept. 1, 1965).

[7]The *per curiam* decisions are criticized in "Obscenity, Pornography and Censorship by Thomas R. Mulroy of the Illinois Bar in 49 American Bar Association Journal (Sept. 1963) at 869. The author cites Justice Jackson's remarks on the empirical reversal of a case without opinion in *Brownell v. Singer*, 347 U.S. 403 (1954):

> "The Court's one-word decision reverses concurring judgments of three highly respected courts . . . (by citing) a single case. . . . I think this Court owed those Courts and the legal profession something more than reference to an inapplicable decision."

[8]Justices Frankfurter, Whittaker and Burton have been replaced by Justices Fortas, White and Stewart.

1961.)[9] Abetted by a misconstruction of the no clear majority opinion decision in the *Manual Enterprises Inc.* case and a misapplication of the special view entertained by Justice Harlan in federal cases, the "hard core pornography" rule spread to the other major centers of pornographic production. *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 31 Cal. Rptr. 800 (July 2, 1963).[10]

C. The No Clear Majority Decisions.

The common disagreement between the justices has given birth to a number of "no clear majority" decisions which confound and confuse.[11] *Manual Enter-*

[9]There is reason to believe that had Justice Desmond recognized the significance of the previous restraint issue in the 1958 cases, his deciding vote would have been cast differently and the minority in that case would have prevailed. See Justice Desmond's concurring opinion in the *Richmond County News Co.* case, his concurring opinion in *People v. Fritch*, 13 N.Y. 2d 119 (June 10, 1963), and his dissenting opinions in *Larkin v. G. I. Distributors Inc.*, 14 N.Y. 2d 869 (June 10, 1964); *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399 (July 10, 1964); *People v. The Bookcase Inc. et al.*, 14 N.Y. 2d 409 (July 10, 1964).

[10]That the California Supreme Court misinterpreted the Harlan view seems apparent from Justice Harlan's vote to deny certiorari in *Grove Press Inc. v. Gerstein*, 378 U.S. 577 (June 22, 1964), a state case. The language of the *Zeitlin* case suggests however, that the author would have come by the same result no matter how he chose to interpret Justice Harlan's opinion in the *Manual Enterprises case.*

[11]One of the basic postulates of the American case law system is that the decision of a majority determines the result, and an "opinion of the court" is written expressing the reasoning agreed upon by the majority. When a majority agree on the result, the decision is final as between the litigants. When a majority agree in the reasoning for the result, the opinion which expresses this reasoning is called the "opinion of the court." If a majority agree on the result, but do not agree in the reasoning for the result, there is no "opinion of the court," even though the controversy is ended as between the parties to the lawsuit.

The decision plus the reasoning found in the "opinion of the court" determine the precedent value of any particular case. In many obscenity cases, however, there has been no "opinion of

prises Inc. v. Day, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639 (1962); *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Grove Press Inc. v. Gerstein*, 378 U.S. 577, 84 S. Ct. 1909, 12 L. Ed. 2d 1035 (1964); *Tralins v. Gerstein*, 378 U.S. 576, 84 S. Ct. 1903, 12 L. Ed. 2d 1033 (1964). The order in appearance of an opinion, rather than solid precedent, often controls the destiny of the people's defenses against the assaults on public morality.[12]

---

the court," as where the majority have agreed *only* upon the *result*, (*i.e.*, judgment reversed) but have not been able to agree upon the supporting reasoning.

Text books on judicial precedent indicates that theoretically the "no-clear-majority" decision stands only for its general result. See Wambaugh, *The Study of Cases* (Second Edition, 1894), at page 50:

> "Even when all the judges concur in the result, the value of the case as an authority may be diminished and almost wholly destroyed by the fact that the reasons given by the several judges differ materially. . . . 'There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case, before they can be considered settled by a decision. If the court is equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.'"

See also Black, *Handbook of Judicial Precedent* (1912), pages 135-136:

> "If all or a majority of the judges concur in the result . . . but differ as to the reasons which lead them to this conclusion, the case is not an authority except upon the general result."

[12]The confusion of the State courts as to what is taking place in the United States Supreme Court is spotlighted in *Arizona v. Locks*, 97 Ariz. 148, 397 P. 2d 949 (Dec. 30, 1964). That court said, in error, at page 951:

> "This was followed by *Manual Enterprises Inc. v. Day*, 370 U.S. 478 . . . *holding* the publication of photographs of nude male figures designed to appeal to homosexuals not to be so obscene as to lose the protection of the First Amendment. (Our emphasis)."

The Arizona Supreme Court's reversal of a jury decision on girlie magazine subject matter was based largely on a comparison with this erroneous reference and belief that Justice Harlan's opinion was the opinion of the Court. The Arizona Court had indicated a different view on the subject matter when the case was before it previously in 372 P. 2d 724 (June 20, 1962) and 382 P. 2d 241 (May 25, 1963).

D. A Major National Problem.

In the absence of knowledgeable defending riflemen, compounded by the confusion, those well-buttressed fortresses are being subjected to a withering attack. On October 21, 1965, the Los Angeles County Grand Jury returned a two count indictment against 14 defendants in *California v. Milton Luros, et al.*, Superior Court case No. 295,183, for conspiracy to manufacture and distribute girlie magazines, nudest magazines and nine lesbian-type paperback books (including Fanny Hill). On February 15, 1965, the count covering the girlie and nudist magazines was dismissed without trial in a pre-trial motion to dismiss the indictment. Superior Court Judge Walter R. Evans, in dismissing, had this to say:

> "In view of the time I have had to study it, I have found it extremely interesting, but absolutely amazing. I was concerned as to the extent to which the United States Supreme Court—I am very frank to say, and I think I am entitled to say it, that I disagree wholeheartedly with the United States Supreme Court cases. I think the so-called founding fathers who promulgated our Constitution probably would turn over in their graves if they saw the extent to which the United States Supreme Court has stretched the protection to this type of material which to me, has no value to anybody. However, that is my personal position. I want to get that off my chest. I think there is nothing but filth from beginning to end in this material. However,

that is my personal opinion, and I think that counsel pointed out that I still have an obligation to follow what I think are the rules laid down by the United States Supreme Court. I was interested in reading one of the learned justices who said that maybe some day the balance will start swinging back where honesty and decency would start entering into a consideration of this thing. I hope it will."

He thought eight of the lesbian-type paperbacks (but strangely, not Fanny Hill) a jury issue, and Count 2 was set for trial. The people's action was short lived however. Although both the District Court of Appeal and the California Supreme Court thereafter refused the defendants a writ of prohibition on the count involving the lesbian-type paperback books, Trial Judge Joseph Sprankle dismissed the case, without trial on June 14, 1965. The books' titles, Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment and Honey Lips, sung out the perversion they peddled.

In another action by the people—this time against a notorious national disseminator located in New York—a criminal obscenity indictment was short-circuited by trial judge J. Irwin Shapiro, when he dismissed *New York v. Ray Kirk, Birch, All State News Co. Inc., et al.*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. In so holding, Judge Shapiro refused to follow controlling precedent in his state, for one of the books supporting the indictment had already been held obscene by New York's highest court in *New York v. Harry Fried*, 18 A. 2d 996, 238 N.Y.S. 2d 742 (Mar. 26, 1963). Appeal dismissed for want of jurisdiction.

Treating the paper whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justice Black, Douglas and Stewart are of the opinion probable jurisdiction should be voted and judgment reversed 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 22, 1964).[18]

E. A Problem of Communication.

The confused results reached in the lower courts noted above does not seem warranted to CDL, when one considers the overwhelming weight of case law in the opposite direction. The key to an awakening of law enforcement seems bound up in the remarks of Chief Justice Warren in *Jacobellis v. Ohio (supra)* at page 1684:

". . . This Court hears cases such as the instant one not merely to rule upon the alleged obscenity

[18]Federal courts are equally confused. See *United States v. Klaw and Jack Kramer*, 350 F. 2d 155 (2nd Circuit July 15, 1965) and *Haldeman v. U.S.*, 340 F. 2d 59, 62 at fn. 6 (10th Cir. Jan. 13, 1965):

"Mr. Justice Stewart, concurring in Jacobellis, declined to define the term 'hard-core pornography,' but stated: 'I know it when I see it . . .' The writer of this opinion has also felt that he would 'know it when he saw it' but a reading of some of the published material held to be constitutionally protected tends to raise doubts regarding one's perceptive abilities in such matters . . ."

When District Judge George Templar found himself reversed as the trial judge in the *Haldeman* case, he turned around and dismissed two major federal grand jury indictments against nationally notorious smut peddlers: Louis Linetsky aka John Amslow & Co. in *United States v. Linetsky*, No. T-CR 582 (D.C. Kansas) (June 24, 1965) and an equally notorious smut merchant in *United States v. Wasserman* (D.C. Kansas) No. T-CR-581 (June 29, 1965). The former involved girlie magazines and illustrations of females in the nude and the latter involved motion picture films, compare these results with *Roth-Alberts (supra)*; *Frank L. Collier v. U.S. (infra)*; *Herman L. Womack v. U.S. (infra)*; *Chobot v. Wisc. (infra)*; *Roy A. Oakley v. U.S. (infra)* *Monfred v. Maryland (infra)*; *Heinecke v. U.S. (infra)*; *Goldstein v. Virginia (infra)*; *Wenzler and Imlay v. Calif. (infra)*.

of a specific film or book but to establish principles for the guidance of lower courts and legislatures. *Yet most of our decisions since Roth have been given without opinion and have thus failed to furnish such guidance. . . .*" (our emphasis).

With the exception of the four *per curiam* decisions in 1958, the only obscenity decisions since Roth-Alberts which have been without opinion, were those in which this Court has dismissed an appeal or denied certiorari. This Court should call attention to these decisions denying certiorari and dismissing appeals. In so far as we have been able to ascertain they are 21 in number:

John G. Matthews v. Florida, writ of certiorari denied 356 U.S. 918, 78 S. Ct. 702, 2 L. Ed. 2d 714 (March 31, 1958), notwithstanding the similarity of the statute to the Michigan Statute in *Butler v. Mich.,* 352 U.S. 80;

Wyman Hulan Parr v. U.S. (film), 255 F. 2d 86, writ of certiorari denied 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (Oct. 13, 1958);

Max Padell v. U.S. (paperback books), 262 F. 2d 357, writ of certiorari denied 359 U.S. 942 79 S. Ct. 723, 3 L. Ed. 2d 676 (March 23, 1959);

Robert H. Cain v. U.S., 274 F. 2d 598, writ of certiorari denied 362 U.S. 952, 80 S. Ct. 864, 4 L. Ed. 2d 869 (April 18, 1960);

Samuel R. Hochman v. U.S. (paperback books: "The Sex Factory" and "Virgins Come High") 277 F. 2d 631, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari) 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (Oct. 10, 1960) rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (Nov. 21, 1960);

Frank L. Collier v. U.S. (photographs of nude young men) 283 F. 2d 780, writ of certiorari denied 365 U.S. 833, 81 S. Ct. 746, 5 L. Ed. 2d 744 (March 6, 1961);

Herman Womack v. U.S. (photographs of nude young men) 294 F. 2d 204, writ of certiorari denied 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822 (March 27, 1961);

Astore v. U.S. (film) 288 F. 2d 26, writ of certiorari denied, 366 U.S. 925, 81 S. Ct. 1352. 6 L. Ed. 2d 384 (May 15, 1961);

Joseph Chobot v. Wisconsin (girlie magazines: "Spice" "Adam" "Spree" and "Blondes, Brunettes, and Redheads") 12 Wis. 2d 110, 106 N.W. 2d 286, appeal dismissed for lack of a federal question (Justices Black, Douglas and Harlan voted for probable jurisdiction), 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (Oct. 23, 1961) rehearing denied 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Roy A. Oakley v. U. S. (unretouched photographs of naked young women) 290 F. 2d 517, writ of certiorari denied 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (Oct. 23, 1961) rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (Dec. 4, 1961);

Harry Monfred et al. v. Maryland (girlie magazines: "Candid" "Consort" "Sextet" "Cloud 9" "Torrid"), 226 Md. 312, 173 A. 2d 173, writ

of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962);

Alfred J. Heinecke v. U.S. (Photographs of nude young men—similar to *U.S. v. Womack*) 294 F. 2d 727, writ of certiorari denied (Justices Black and Douglas voted to grant certiorari), 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (Nov. 6, 1961);

Harold S. Kahm v. U.S. (for description of subject matter, see 300 F. 2d 78 at 82), 300 F. 2d 78, writ of certiorari denied 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962);

Louis Finkelstein et al. v. New York (paperback books: "Garden of Evil" and "Queen Bee"), 229 N.Y.S. 2d 367, 183 N.E. 2d 661 writ of certiorari denied (Justice Douglas voted to grant certiorari), 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Harold Zucker v. New York (3 sado-masochistic books similar to 50 books involved in *New York v. Mishkin*, also before this court), writ of certiorari denied (Justice Douglas voted to grant certiorari) 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962);

Arthur Goldstein v. Virginia (girlie magazines) writ of certiorari denied 372 U.S. 910, 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963);

Edward Mishkin v. U.S. (books not named), 317 F. 2d 634, writ of certiorari denied 375 U.S. 827, 84 S. Ct. 71, 11 L. Ed. 2d 60 (Oct. 14, 1963);

John Darnell, II, v. U.S. (obscene letter), 316 F. 2d 813, writ of certiorari denied (Justice Douglas voted to grant certiorari), 375 U.S. 916, 84 S. Ct. 205, 11 L. Ed. 2d 155 (Nov. 12, 1963), rehearing denied, 375 U.S. 982, 84 S. Ct. 493, 11 L. Ed. 2d 429 (Jan. 6, 1964);

Nirvana Ward Zuideveld v. U.S., 316 F. 2d 873, writ of certiorari denied, 376 U.S. 916, 84 S. Ct. 671, 11 L. Ed. 2d 612 (Feb. 17, 1964);

Harry Fried v. New York (paperback books: "College for Sinners" "Sex Cat" and seminude photographs of women), 238 N.Y.S. 2d 742, appeal dismissed for lack of jurisdiction. Treating the papers wherein the appeal was taken as a petition for writ of certiorari, certiorari is denied (Justices Black, Douglas and Stewart are of the opinion that probable jurisdiction should be noted and judgment reversed), 378 U.S. 578, 84 S. Ct. 1904, 12 L. Ed. 2d 1033 (June 26, 1964);

Samuel Dodd Williamson v. California (paperback book: "Fear of Incest"), 207 Cal. App. 2d 839, 24 Cal. Rptr. 734, writ of certiorari denied (Justice Doulas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied .... U.S. ...., 85 S. Ct. 13, 13 L. Ed. 2d 77 (Oct. 12, 1964);

Harold Eugene Wenzler, Sr., and John Imlay v. California (8 mm movie, 12 minutes—"First Fling" described as girlie magazine subjects in motion) writ of certiorari denied (Justice

> Douglas voted to grant certiorari), 377 U.S. 994, 84 S. Ct. 1902, 12 L. Ed. 2d 1047 (June 22, 1964), rehearing denied, ... U.S. ...., 85 S. Ct. 14, 13 L. Ed. 2d 77 (Oct. 12, 1964).

There is rarely any mention made in a trial court or in a State Supreme Court of any of the criminal convictions, which this Court has refused to reverse, or the obscene matter involved in those cases. The rare exception is *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962), which, in answer to the defendant's claim that the girlie magazines "Modern Man" (July 1960) and "Modern Man—Yearbook of Queens" were not obscene, said:

> "The defendant's claim that there were no obscene magazines to support his conviction on the first and second counts is without merit. Monfred v. State, 226 Md. 312, 317, 173 A. 2d 173, Cert. denied, 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2 386; State v. Chobot, 12 Wisc. 2, 110, 116, 106 NW2 286, dismissed, for lack of a substantial federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed2 85. . . ."

The end result it that the people's cause suffers. The bad cases are highlighted and the good cases go unnoticed.

The Connecticut Supreme Court has recognized what in our opinion appears to be good logic and good law if the United States Supreme Court must, in each instance make a constitutional judgment as to whether any given subject matter is either, as a matter of law, protected speech; or a question of fact on the issue of obscenity, for the jury to decide, then a denial of review

(either by dismissal of an appeal or by denial of certiorari) places the material in the latter category.[14]

F. Reconciling the Cases.

When the obscenity statutes have been applied as *criminal statutes* trying "conduct," the People's case has met with no opposition from the United States Supreme Court, except in the case of *Jacobellis v. Ohio,* 378 U.S. 184, 84 S. Ct. 1674. Unfortunately, the United States Supreme Court has failed to publicize such results by way of formal opinion.

Justice Warren, in his dissenting opinion, in *Jacobellis v. Ohio,* 84 S. Ct. 1674 (June 22, 1964), makes it clear that this Court is not defending obscenity, but that *it only appears to do so* when it is faced with procedurally bad cases, at page 1685:

> "There has been some tendency in dealing with this area of the law for enforcement agencies to do only that which is easy to do— for instance, to seize and destroy books with only a minimum of protection. As a result, courts are often presented with procedurally bad cases and, in dealing with them, appear to be acquiescing in the dissemination of obscenity. But if cases were well prepared and were conducted with the appropriate concern for constitutional safeguards, courts would not hesitate to enforce the laws against obscenity."

---

[14]The general rule of law that denial of certiorari means "nothing" or "nothing much," would seem to have little application in free speech cases. See *Supreme Court Practice,* 3rd Ed., Stern and Gressman, P. 182, where the authors discuss this point in writs of habeas corpus cases.

Our analysis points to a major point of distinction between those cases which draw into issue the conduct of an individual and those which involve "prior restraint." The final results have certainly been distinguishable. The seven year history points to a course of conduct which has meaning.

The "procedurally bad cases" referred to by Justice Warren were not criminal cases involving "conduct" but were the cases cited in footnote 5, involving "prior restraint." Where difficulty has been encountered, it has been in the area of "prior restraint" by administrative officials (motion picture censor boards and Postmaster cases and mass seizures under search warrants). "Due process" considerations were a major issue in such cases. See here, the four *Per Curiam* decisions in 1958 (prior restraint—no jury trial on the issue of obscenity; material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove his right to distribute by injunctive action); *Marcus v. Kansas City Search Warrants*, 367 U.S. 717, (prior restraint—mass seizure under general search warrant, non-criminal proceeding aimed at destruction of subject matter rather than at conduct of vendor); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 48 (prior restraint—boycott, rather than criminal trial of vendor); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (prior restraint—material kept from mails in preference to criminal trial for disseminating obscene material, vendor required to prove right to distribute by bringing an injunctive action); *A Quantity of Books v. Kansas*, 84 S. Ct. 1723 (prior restraint—mass seizure, non-criminal proceedings aimed at destruction of subject matter, rather than at conduct of vendor, no right to jury trial on issue of obscenity). *Freedman v. Maryland*, 380 U.S. 51 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action); *Trans-Lux Distributing Corp. v. Board of Regents of New York*, 380 U.S. 259 (prior restraint—movie censor board, exhibitor required to prove his right to exhibit by injunctive action).

In all of these cases, the People could have brought the criminal action and held the defendant accountable for his "conduct" (with the procedural safeguards of criminal procedure, *i.e.*, jury trial and burden of proof) and avoided the prior restraint issue. They chose the "prior restraint" attack in preference, unaware that this Court's policy was to give *Near v. Minnesota* as narrow a construction as possible. Unfortunately, the disinterested prosecutor pictured above, at this late date, is unaware of this basic distinction in the case law. Furthermore, he is unwilling to pursue the distinction, though convinced by logic, without a more direct signal from this Court.

It appears symbolic therefore that, in this climate of stalemate, petitioners Ginzburg, *et al.* and Mishkin should now find themselves before this Court at the same time in criminal cases. Their respective operations are as unto *Roth* and *Alberts* as peas in a pod.[18]

This Court must now decide if it meant what it said when it put pornographers Roth and Alberts out of business in 1957.

---

[18]The reporter's comments in the American Law Institute, Model Penal Code (1957 draft) section 207.10 at page 14 describes the obscenity offense:

> "The gist of the offense we envision, therefore, is a kind of 'pandering'"

which accurately discribes their separate activities. At page 13, the reporter comments:

> "The main purpose of Section 207.10 is to suppress commerce in the obscene. If production and circulation of obscene material for gain can be eliminated, the supply would be cut off at the source . . ."

II.

This Court Should Affirm the Judgment.

A. Introduction.

One should bear in mind at the outset that this is not the case of a defendant who has been deprived of a right to trial by a jury of his peers in the community in which the crime occurred. Under the Federal Statute, of which the Petitioners stand convicted, they had a clear right to a trial by 12 jurors and the benefit of the burden of proof in criminal cases, which requires the prosecutor to prove to each and every one of these 12 jurors, that the defendant's conduct was unlawful, beyond a reasonable doubt. They waived that right at the outset, but not without reason, for "defendants in obscenity cases want nothing so little as a jury trial"[18] XL Notre Dame Lawyer, No. 1 at page 10 (Dec. 1964). *Bromberg, Five Tests for Obscenity*, 41 Chicago Bar Record, 416, 418 (1960).

Having made that waiver, and placed their fate in the hands of the trial judge, they now argue on appeal that which would not be available to them in the case of a jury verdict. Though ever so subtle, the argument is that it was the subjective feelings of the trial judge which decided the matter, not the community's sense of responsibility.

---

[18]"Defendant invariably recoils in horror at any suggestion that the question of obscenity be submitted to a jury. This leads one to question his sincerity for there is no better way of determining community standards of morality than the time-tested method of trial by jury . . ." Bromberg, Five Tests for Obscenity, 41 Chicago Bar Record 416, 418 (1960).

"Are they not telling the justices that they believe they can prevail only if the community standard is *not* applied? The Court hasn't gotten the message . . ." XL Notre Dame Lawyer No. 1, 10 (Dec. 1964).

At page 28 of their brief, the petitioners argue "'Customary limits of candor' are still measured by the type of material a trial judge would have in *his* library or upon *his* coffee table." At page 29: "Attempts to treat these concepts as objective standards and to offer evidence in traditional form on whether a particular work can, by such standards, be judged 'obscene' are rebuffed by triers of fact whose subjective reaction to the work is too strong to permit enlightenment by objective proof." At page 34: "Experts on mass culture . . . are in a much better position to know what society now tolerates than a judge whose personal reading habits may be quite different from those of the crowd." At page 43: "It does not appear that the trial court had any special knowledge on matters literary or artistic. What the trial judge did then was to 'arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence . . ." Had the case been tried to a jury, their arguments would have been swallowed up in the jury verdict and the result should not be different here. Having waived the jury, petitioners should not be permitted to argue what a jury *would have found as to* "customary limits of candor," "what objective proof constitutes enlightenment," "what society tolerates," or "whether or not the jury would accept the offered expert testimony," as against what the trial judge *did in fact* find.

The petitioners find themselves in no better position than petitioner David Alberts who waived a jury trial in *Alberts v. California (supra)*. As to that defendant, this Court said at page 489:

> "Both trial courts below sufficiently followed the proper standard. Both courts used the proper def-

> inition of obscenity . . . in the Alberts case, in ruling on a motion to dismiss, the trial judge indicated that, as the trier of facts, he was judging each item as a whole as it would affect the normal person . . ."

A close reading of the trial transcript reveals no lack of receptivity on the part of the trial judge to the petitioners' efforts to "enlighten." That he should reject their theory of the case is understandable upon an examination of the evidence presented at the trial, including the exhibits, defendants' conduct in relation thereto, and the testimony.

B. The Roth-Alberts Facts Control.

Because the *Roth-Alberts* defendants and materials so closely resemble their counterparts in this and the *Mishkin* case, also before this Court in *Mishkin v. New York*, No. 49, they assume a particular relevance to the issues raised by these defendants. As to the materials involved in *Roth-Alberts*, see 45 Minn. Law Review, 5, 20, *et seq.* and footnotes 88-102.

In *United States v. Roth*, 237 F. 2d 796, 800 (Sept. 18, 1956) Judge Clark in the Court of Appeals, Second Circuit below, said of Roth and his materials:

> "As we have indicated, if the statute is to be upheld at all it must apply to a case of this kind where defendant is an old hand at publishing and surreptitiously mailing to those induced to order them such lurid pictures and material as he can find profitable. There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would

> find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison."

In his petition for certiorari, Roth raised an issue that the publications of which he stood convicted were not obscene.[17] One of the books was "American Aphrodite, Vol. 1, No. 3," whose description bears considerable resemblance to "Eros Vol. 1, No. 4."[18] This Court apparently did not consider Roth's claim substantial, for in granting the writ,[19] jurisdiction and arguments were limited[20] to three of the other issues in the jurisdictional statement.

---

[17]Petition for Writ of Certiorari, pp. 2-3; 45 Minn. L. Rev. 5, 21.

[18]See 45 Minn. L. Rev. 5, 20, at footnotes 88, 89:

"88. The particular issue of *America Aphrodite* was volume 1, number 3, as correctly stated in count 24; the reference to 'Number Thirteen' in count 17 appears to be a typographical error. See Record, pp. 19 & 15 respectively.

Among the distinguished authors whose works appeared in the issue were Herbert Ernest Bates, perhaps best known in the United States for *The Purple Plain*, Rhys Davis, whose *The Trip to London* delighted thousands of its readers. Pierre Louys, famous for *Aphrodite*, and Edwin Beresford Chancellor, author of *The Lives of the Rakes* and many other historical works. Here, too, were pieces by Harold Alfred Manhood, John Cournos, Patrick Kirwan, Henry Miller, and Harry Roskolenko (Colin Ross).

In England, D. Val Baker criticized the Postmaster General's earlier exclusion of *American Aphrodite* from the United States mail, pointing out the genuine literary quality of its contents. Baker, *Aphrodite in Trouble*, 168 Publishers' Circular and Booksellers' Record 924 (1954)."

"89. Record, pp. 1-19; Brief for the United States in Opposition, pp. 12-13 . . . Since the count involving only American Aphrodite included both the book itself and advertisements for it, the sole element of consistency in the verdict is the conclusion that the book was obscene . . ."

[19]The granting of writs of certiorari are discretionary. Supreme Court Practice, Third Edition, Stern and Gressman, page 118.

[20]See 352 U.S. 964 and 45 Minn. L. Rev. 5, 22.

On the other hand, David S. Alberts' approach to this Court was by way of appeal under 28 U.S.C. section 1257,[21] rather than by petition for writ of certiorari. In his jurisdictional statement, one of the issues raised was whether the statute "upon its face and *as construed and applied*" abridged "freedom of speech, press and thought."[22] which should have been sufficient to state grounds for appellate jurisdiction on the issue of obscenity under 28 U.S.C. section 1257.[23] This Court noted probable jurisdiction in *Alberts v. California*, 314 U.S. 160, which theoretically placed the obscenity issue before this Court. Alberts argued the matter to some extent in his briefs.[24]

In its majority opinion in *Roth-Alberts (supra)*, this Court said on the issue of obscenity *vel non* at page 476, footnote 8:

> "No issue is presented in either case concerning the obscenity of the material involved . . ."

Was this Court saying that this issue was so unsubstantial as to require no discussion?—in effect, that

---

[21]"Where an appeal may properly be taken, the so-called obligatory jurisdiction of the Supreme Court is thereby invoked, in contrast to the discretionary jurisdiction over certiorari cases . . ." Supreme Court Practice, Third Edition, Stern and Gressman, page 63.

[22]Jurisdictional Statement, pp. 4-5, 45 Minn. L. Rev. 5, 25.

[23]"The 'validity' of a state statute is also said to have been sustained. within the meaning of §1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282. This is true even though the statute on its face bears no federal impediment. Thus where the court holds that a particular transaction is intrastate rather than interstate commerce and that on such basis the state statute may be applied and enforced, the validity of the statute has been sustained as to those facts." Supreme Court Practice, Third Edition, Stern and Gressman, p. 67.

[24]See 45 Minn. L. Rev. 5, 25, and footnotes 110, 111.

without the other major issues the Court would not have written an opinion, but would have dismissed for want of a federal question or affirmed the appeal without opinion as in the case of *Joseph Chobot v. Wisconsin (supra)*. Or did the Court give Mr. Roth and Mr. Alberts less than justice? Roth was facing a 5-year sentence and $5,000.00 fine and Alberts was facing a 30-day jail sentence. In their concurring opinions, both Justices Harlan and Warren reviewed the materials.

One commentator has interpreted this footnote to indicate the majority did not treat the obscenity issue. 45 Minn. Law Review 5. But this is inconsistent with the role of the jurist expressed by Justice Brennan, its author in his dissenting opinion in the companion case of *Kingsley Book Inc. v. Brown (supra)* at 448:

> "Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e. that reasonable men may differ whether the material is obscene . . ."

Later opinions of its author have indicated that review of the subject matter was necessary in free speech cases.[25] Justice Brennan would employ the rule as stated in the American Law Institute, Model Penal Code (1962), section 251.4(4) which holds that "The court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."[26]

---

[25]See, for example, the opinion of Justice Brennan, concurred in by Justice Goldberg, in *Jacobellis v. Ohio* (*supra*) at p. 1679:

> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected . . ."

[26]*Jacobellis v. Ohio* (*supra*), footnote 6 of Justice Brennan's opinion.

It should also be noted that in the majority opinion, Justice Brennan said at page 489:

> "Both *trial courts* below sufficiently *followed* the proper standard. Both courts used the proper definition of obscenity . . ." (our emphasis).

Does the language "trial courts . . . followed" indicate that the majority found that the trial court in *Alberts* correctly applied "the proper standards to the material?"

C. The Roth-Alberts Standards.

The majority opinion in *Roth-Alberts* (*supra*) approved four definitions for the word "obscene." At page 486, the federal court sponsored test in *Roth* and the State Court sponsored test in *Alberts* were set forth:

> "In *Roth*, the trial judge instructed the jury: 'The words obscene, lewd and lascivious as used in the law, signify that form of immorality which has relation to sexual impurity and has a tendency to excite lustful *thoughts*.' (Emphasis added.) In *Alberts*, the trial judge applied the test laid down in *People v. Wepplo*, 78 Cal. App. 2d Supp. 959, 178 P.2d. 853, namely, whether the material has 'a substantial tendency to deprave or corrupt its readers by inciting lascivious *thoughts* or arousing lustful desires.'"

The court thereafter held both tests to be within the constitutional standard, when given with proper jury instructions relevant to the dominant theme and proper audience.

At page 489, Justice Brennan gave tacid approval to a *third* definition in these words:

> "Some American courts adopted this standard but later decisions have rejected it and substituted this test: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press . . ."

At page 487, footnote 20, the majority opinion gave approval to the definition found in the A.L.I. Model Penal Code, Section 207.10(2) (Tentative Draft 1957) and noted no significant difference between this and the meaning of obscenity developed in the case law:

> ". . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . . See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

D. The Trial Court Followed the Roth-Alberts Standards.

Trial Judge Body properly followed the Roth Standards. He noted preliminarily in his opinion at 224 F. Supp. 129 at 133;

> "If material has *any* socially redeeming importance it is protected . . ."

In his investigation into the matter of "social redeeming importance" he applied the facts at bar, and did not move in a vacuum, as petitioners would have this Court do. The variable nature of obscenity requires this.

Burstein v. U.S., 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (Apr. 6, 1936.)

1. Liaison Vol. 1, No. 1.

As to "Liaison Vol. 1, No. 1," he found that the three articles, "Slaying the Sex Dragon," "Semen in the Diet," and "Sing A Song of Sex Life" covered the most "perverse and offensive" behavior and that the treatment was "largely superficial". He noted that the defendants' own expert, Magazine Editor Dwight MacDonald, testified that it had "no literary value". If it could be said there was social redeeming importance in the magazine, it had to be found in what it advocated, or in its entertainment value. As to the latter he found the material beyond contemporary community standards "even in applying the liberal night club standards." As to the former it failed "to serve a legitimate purpose of an author in recording human experience or in seeking to accomplish a worthwhile objective." The *only* idea advocated was complete abandon of any restraint with regard to any form of sexual expression, which one can say exists in every form of pornography. He found the pamphlet "designed obviously and solely for the purpose of appealing to the prurient interest of an ordinary person."

Amicus submits the trial judge properly applied the Roth Standards to "Liaison", noting further that the idea expressed by all pornography, *i.e.*, the complete abandonment of any restraint with regard to forms of sexual expression, is too "slight" to be redeeming. *Chaplinski v. New Hampshire (supra)*.

The finding that the pamphlet was "designed" solely for its appeal to prurient interest is supported by the common scheme or plan which attended the creation and

dissimination of "Eros Vol. 1, No. 4" and "The Housewife's Handbook on Selective Promiscuity." A.L.I., Model Penal Code (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

2. The Housewife's Handbook of Selective Promiscuity.

As to "The Housewife's Handbook on Selective Promiscuity" the trial judge noted that, as in the case of "Liaison," no literary merit was ascribed to the book. Its only claim to redeeming value was expert testimony to the effect that it had utility as a clinical device to "ventilate" persons with sexual inhibitions and misconceptions. The court expressly rejected that testimony.

The court noted that the author testified under oath it was a factual and highly accurate reporting of actual occurrence, but that he doubted the accuracy of the book (indirectly, her testimony). It met the prescribed tests for pornography—it was a bizarre exaggeration, morbid and offensive. An examination of the book in capsule form, by book outline bears out the correctness of this finding (Appendix A).

The court explained its reason for disbelieving the testimony of the Reverend George von Hilsheimer III, "This same witness shocked the writer by saying that this book should be in every home and available for teen-agers for guidance in sex behavior, but in my opinion misbehavior . . ." It was petitioners' expert witness, Rev. Hilsheimer who first brought up the matter of the book's suitability for use by "youth" [R. 291a]. He volunteered in his direct testimony at R. 291a and R. 292a that it was an "innocent book" which it was necessary for him to give "youth" as a pastoral counselor, if he was going to be responsible "to his youth." The trial judge questioned him further, and it developed that that was what he meant.

It should be noted that petitioners' other expert witness along these lines, Dr. Charles G. McCormick (psychologist) did not agree with Rev. Hilsheimer, who said he did not supervise the reading, [R. 295a]. Dr McCormick applied a restriction [R. 217a] to "guide the person in making distinctions."

Dr. Bennett, the psychiatrist testified that a 14-year old would not be disturbed by the "Handbook." The trial judge had reason to question the standards he employed in his expert testimony on the "effects of the material, and to reject the same.

The determination of obscenity is ultimately with the fact finder and not with the expert witnesses in any event. *United States v. Kennerley*, 209 Fed. 119, 121.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community . . ."

As to the audience he considered, the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

The prurient nature of "The Handbook" is attested to by the common scheme or plan which attended the creation and dissemination of "Eros Vol. 1 No. 4" and "Liaison". A.L.I. M.P.C. (1957 draft) section 207.10(2)f. The stipulation as to "knowledge" did not foreclose other admissible evidence on intent for the prosecutor reserved that right [R. 152a].

3. *Eros Vol. 1 No. 4.*

As to "Eros Vol. 1 No. 4" the judge properly construed the "balancing" concept of the A.L.I Model Penal Code (1957 draft) section 207.10 to find no redeeming social importance. This fact is demonstrated by his comparison of the novel Lady Chatterley's Lover with the work under scrutiny, "It is one thing to create an integrated work of art containing what would be obscenity standing alone, and another thing to create an integrated work of obscenity containing excerpts from recognized works of art."

As the Judge noted, the Allen Ginsberg article was a written statement of policy, purposely contrived and disseminated—the destruction of all barriers against sexual behavior of any kind. When this is combined with independent displays of obscenity, the innocent will not shield the obscene.

The question of redeeming social importance must be determined in the light of the facts and not in a vacuum. The variable nature of obscenity requires this. *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1944); *United States v. Levine*, 83 F. 2d 156, 157 (April 6, 1936).

In the case of Eros, the items of possible merit and those which are considered innoculous are a mere disguise. The "overriding theme, and the only theme of Eros is the advocacy of complete sexual expression of whatever sort and manner." The finding that the magazine was "designed" solely for its appeal to prurient in-

terest is supported by the pattern—the craftily compiled overall effect, which purposely loads the forbidden fruits: "Frank Harris, His Life and Love", "Bawdy Limericks", "Natural Superiorty of Women as Eroticists" and "Black and White in Color" and seeks to ameliorate the criminal liability through the disguise. The whole, however, take on the flavor of the part.

Amicus submits that the "design" of Ginzburg's operations on Eros to appeal to prurient interests is also supported by the common scheme or plan which attends the creation and dissemination of his other products, "Liaison" and "The Housewives Handbook on Selective Promiscity." The stipulation as to "knowledge" did not foreclose other admissible evidence on intent, for the prosecutor reserved that right [R. 152a]. See also A.L.I., MP.C. (1957 draft) section 207.10(2)f.

The judge considered the proper audience in making his findings. This Court approved an instruction in *Roth* which held: "The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. . . ." As to the audience he considered the trial court said:

> "It is also the law that the community as a whole is the proper consideration. In this community, our society, we have children of all ages, psychotics, feeble-minded and other susceptible elements. Just as they cannot set the pace for the

average adult reader's taste, they cannot be overlooked as part of the community. The community as a whole is not an ideal man who wouldn't seek and read obscenity in the first place. Otherwise no restraint at all would be required. Some is proper. Therefore, an ideal person without any failings or susceptibility is not the man to protect. Society as a whole, replete of course with various imperfections, must be protected."

E. Social Importance.

1. *It Is Not Determined in a Vacuum.*

At page 32 of their brief, petitioners argue "Only if the words of Roth 'utterly without redeeming social importance' mean what they say, can criminal obscenity statutes survive the challenge that they violate the Fifth, Sixth and Fourteenth Amendments. Thus, material found to have some social value may not be suppressed and certainly may not be the basic for criminal conviction of the utterer or disseminator. Only when a work is found to be totally devoid of value can we even begin to subject that work to the other tests which identify actionable obscenity. . . ." Such an argument misconceives the very nature of obscenity—it has a variable quality about it. The guilt or innocence of the act, display, or publication depends not only upon the work but also upon the surrounding circumstances. The time and manner of acting and motives involved are always relevant and may even be determinative. Petitioner's argument lacks a necessary qualification. The value must be considered in light of the circumstances.

For example, at page 50 of their brief, petitioners take issue with the court below, because the trial judge

found that there was "no credible evidence that the 'Handbook' had the slightest valid scientific importance for treatment of individuals in clinical psychiatry, psychology, or any field of medicine." In doing so, the judge indicated he was not won over by the testimony of the Reverend von Hilsheimer, Dr. Bennett and the author on that score. But assuming that the testimony did indicate some value as a case history or the like, that value cannot be considered alone and in a vacuum, independent of the petitioners' personal conduct in relation thereto.

The classic example is *Burstein v. U.S.*, 178 F. 2d 665 (Dec. 28, 1949). A book entitled, "Sterile Sun" had been published by Macauley Company and issued by that company in a special edition, the sale of which was limited to physicians, psychiatrists, sociologists, social workers, educators and other persons having a professional interest in the psychology of adolescents. The book was to be found in the public library upon the restricted shelves. Burstein made copies of the book, omitting the statement of the publisher respecting the limitation of sale, and an introductory note which emphasized the statement that the book was written for a professional group. He gave it a new title called "Confessions of a Prostitute" and mailed circulars advertising the book as "spicy," "too sharp for ordinary consumption" and quoted a few especially salacious and suggestive lines from the book. On his appeal from convictions for both depositing for mailing an obscene book, and depositing for mailing a letter giving information as to where and how the book might be obtained, he argued that the book was not obscene *as a matter of law*. The Court of Appeals for the Ninth

Circuit held that the trial judge was correct in submitting the matter to the jury. Under petitioners theory, Burstein could go on about his business.

District Judge Bryan expressed the same principle in *Poss v. Christenberry*, 179 F. Supp. 411, 416 (Dec. 21, 1959). Poss argued in that case that the *per curiam* decision of this Court in *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352, compelled a holding that his circulars, depicting nude photographs which advertised nude movies, photos and color slides, were not obscene. Judge Bryan thought otherwise, at page 416:

> "In the circular at bar there is little doubt that the publisher's purpose is to appeal to the salaciously minded. No one could be naive enough to suppose that these photographs have anything whatever to do with 'art.' The circular does not contain any ideas of redeeming social importance.' Nor has it the slightest vestige of literary or artistic merit. The publisher's purpose in putting out the material may well be 'a cardinal determinative.' See Glanzman v. Schaeffer, D.C. S.D. N.Y., 143 F. Supp. 243, 247."

See also the discussion at footnote 6.

The Petitioners' attempt to concentrate the investigation on the "thing" rather than the "conduct, in relation to the thing." A number of examples suggest the fallacy of this concept: A person may utter a four letter word, or a stream of such words in the restrictive audience of a group, when such conduct is essential to the portrayal of a character in a play, yet he may find himself in difficulty when he utters those same words over a loud speaker on the grounds of a college campus, in

defiance of community standards. A p- ·son may not be in violation of the criminal statutes were he to relieve himself (urinating) out of necessity in a public alley and accidentally be seen by a female from an adjoining yard. The result would be otherwise if he purposely summoned the attention of the female and relieved himself for the purpose of the public exhibition. In obscenity cases as in criminal cases in general, the defendant's conduct is the central issue. As stated by Chief Justice Warren in his concurring opinion in *Roth v. U.S.*, 345 U.S. 476, 494:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting."

See also Chief Justice Warren's opinions in *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 1 L. Ed. 2d 1469, 1476 (1957), and *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1673, 1685 (1964).

The same principle is very well stated by the Supreme Court of Errors of Connecticut in *Connecticut v. Sul*, 146 Conn. 78, 147 A. 2d 686, 691 (Dec. 24, 1958):

> "Obscene and indecent are not technical terms of law and hence susceptible of fine distinctions. Whether something is obscene or indecent depends upon all of the surrounding circumstances. Section 8567 comprehends material which from its very character a person of sound mind must know was

obscene and indecent. See Wigmore, Evidence (third edition) page 43. It also includes material which by the method of its presentation to the prospective reader or viewer shows a design to appeal to sordid interests. See Roth v. U.S., supra, 354 U.S. 495, 77 S.Ct. 1314 (concurring opinion). To cite an example; if language and pictures describing or portraying human sex organs are contained in a book or brochure on medical science and treat the subject with no more frankness than is required, they would not be obscene or indecent within the statute. But if the same language and pictures were taken from their context and compiled in pamphlet form to be sold or shown to children, they would be. People v. Muller, 96 N.Y. 408, 413. The purpose of the statute is to prevent the selling, showing or offering of obscene or indecent material falling within the description stated."

See also the expression of the Supreme Court of Errors of Connecticut to the same effect in *State v. Andrews,* 186 A. 2d 546 at page 550.

2. *Slight Social Importance Does Not Exculpt.*

At page 31 of their brief, petitioners argue, "The First Amendment principle bars suppression of any work of the slightest value, whether the suppression be accomplished by civil order or criminal sanction." This appears to *amicus* as an exaggerated statement of the law, easily responded to. At page 476 of *Roth-Alberts (supra)*, the majority opinion cited with approval the *Chaplinsky* Court (*supra*) opinion, which held:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punish-

ment of which have never been thought to raise any constitutional problem. *These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .*"

The very language of the Court indicates that speech may have "slight social value" and yet be subject to punishment, because by its nature it is obscene.

In support of this argument, petitioners, at page 31 of their brief cite language in *Jacobellis v. Ohio (supra)* that:

"The constitutional status of the material (may not) be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance . . ."

The language is that of Justice Brennan, concurred in by Justice Goldberg and was not the opinion of this Court. The accuracy of this statement of law is doubtful, if we are to believe that this Court is following prior case law, as reported in the comments to the American Law Institute, Model Penal Code (1957 draft) section 207.10. In this regard the reporter states at page 30:

"The second aspect of the recommended definition, requiring that appeal to prurient interest be the *predominant* appeal of the material, recognizes that a work of art or literature may contain elements of prurient interest, which, however, are subordinate

to other positive values of the work. Policy as well as constitutional limitations enjoin us to safeguard freedom of expression by *balancing artistic or other merits of a work against the alleged prurient appeal*...." (Our emphasis).

and at page 40:

"11. *Effect of Artistic or Scientific Merit.* The effect of our proposals on definition of the obscene, consideration of the work 'as a whole,' and admissibility of evidence of artistic and other merits is to permit consideration of positive values of the work in determining whether the predominant appeal of the work is to prurient interest. This does not differ substantially from present law."

and at page 42:

"Our reasons for hesitating to relate the definition of obscenity directly to appraisal of artistic merit are as follows. In the first place, great artistry is not necessarily inconsistent with prurient appeal; consummate skill in execution might be the very thing which lends the work its powerful erotic appeal. . . .

Accordingly, we have refrained from making artistic or other merit a direct and independent issue in obscenity trials. On the other hand, it is obvious that the issue of 'predominant appeal' involves not only a judgment that the material in question appeals to prurient interest, but also a judgment that it has this characteristic more than any other. Thus consideration is invited to the question of what other appeal, if any, the material has. And in subsection (2) (c) we expressly provide for the

admissibility of evidence as to artistic, literary, scientific, educational or other merits.

The slight but real difference between a defense or justification on the basis of artistic worth and mere permission to introduce evidence of artistic merit as bearing on the issue of 'predominant appeal' may be seen in the possibility, under the later arrangement, of (1) convicting notwithstanding great artistic competence, where the main appeal is to prurient interest; and (2) acquitting notwithstanding that the material has little or no artistic merit and some, but not much, appeal to prurient interest, in short, is a dull piece with no significant 'appeal', where a trace of the salacious is lost in a sea of inanity.

The ultimate question is how prominent is the appeal to prurient interest in the work as a whole, whatever the value judgment placed on the balance of the work." (Our emphasis).

The employment of such language in a majority opinion of this Court would invite disaster to the federal governments attempts to control obscenity. The language in Justice Brennan's opinion was taken from the California Supreme Court opinion in *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 920, 31 Cal. Rptr. 800, 813, 383 P. 2d 152, 165 (1963) where it has brought about a sterilization of obscenity law enforcement in that state. See also the incongruous result reached by four members of the New York Court of Appeals, holding that classic of pornography, Fanny Hill not obscene in *Larkin v. G. P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 74, because:

"It has a *slight literary value* and it affords *some insight* into the life and manners of mid-18th Cen-

tury London . . . Some critics, writers, and teachers of stature testified at the trial that the book has merit, and the testimony as a whole showed reasonable differences of opinion as to its value. It does not warrant suppression . . ." (our emphasis).

It is true that the Illinois Supreme Court in *People v. Bruce*, 31 Ill. 2d 459, 202 N.E. 2d 497 (1964) wrote an opinion upholding contentions similar to those of the petitioners. In that case, the majority opinion (Schaefer concurred in the result) noted that it had, in an earlier opinion in the same case, rejected the defendant's arguments that the *Roth* case, struck down the "balancing test" which was ruling case law in *American Civil Liberties Union v. City of Chicago*, 3 Ill. 2d 334, 121 N.E. 2d 585. The *Civil Liberties* case held at page 498; that:

> "the obscene portions of the material must be balanced against its affirmative values to determine which predominates. . . ."

Following the *Jacobellis* decision, the Illinois Supreme Court reversed its previous ruling, giving as its *sole* reason, at page 498:

> "It is apparent from the opinions of a majority of the court in Jacobellis that the 'balancing test' rule of American Civil Liberties Union is no longer a constitutionally acceptable method of determining whether material is obscene, and it is there made clear that material having *any* social importance is constitutionally protected."

The Illinois Court was led into accepting a rule of law it would not otherwise have adopted, at page 498:

> ". . . we would not have thought that constitutional guarantees necessitate the subjection of society to the gradual deterioration of its moral fabric which this type of presentation promotes . . ."

Mr. Lenny Bruce did not fare as well with his arguments in *Bruce v. New York* (unreported, Dec. 1964). In that criminal action in New York City he was found guilty of using obscene words in his nightclub act. On a petition for certiorari, this Court refused to consider his case in June 1965.

If the Illinois Supreme Court knew then (Nov. 1964), what it knows now (June 1965), the Bruce matter undoubtedly would have been decided differently. The strength of *People v. Bruce* (*supra*), as a precedent in Illinois is questionable.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amicus Curiae.

APPENDIX "A".

The Housewife's Handbook on Selective Promiscuity.

By Rey Anthony (240 pages, in two parts). Seventh printing, c1962, LC 62-21130. Documentary Books, Inc., 110 West 40th Street, New York 18, N.Y.

INTRODUCTION

By Albert Ellis, Ph. D., New York City, September 15, 1960.

Dr. Albert Ellis states: "I have no hesitation in stating that Mrs. Anthony's Handbook is one of the most honest, courageous, valuable books on sex that I have ever read." (p. 7) He compares her writing to Mrs. Hilda O'Hare, publisher of the now-defunct scientific periodical, the International Journal of Sexology, giving her own views, in terms of personal experience, "on vaginal versus clitoral orgasm." (p. 7). Drs. Mary Calderone, Sophia J. Kleegman, and Lena Levine, among others, have "consistently stated, at meetings, of the American Association of Marriage Counselors, the Society for Scientific Study of Sex, and other professional groups, that the truth about female orgasm will never be fully known until women themselves give us their own detailed accounts and studies of what happens in their minds and bodies when they are engaged in sexual relations." (p. 7). "I find that the Handbook makes a distinctly valuable contribution to sexual knowledge." (p. 8). "More power to Mrs. Anthony—and a copy of her book to many of her (and my) professional colleagues!" (p. 9). "My own Art and Science of Love, may prove quite useful to millions of young people who have much to learn about sexual technique." (p. 9).

PREFACE BY THE AUTHOR'S DAUGHTER

By Tannette Savelle (age 19), Tucson, Arizona, August 1, 1960.

"This book was not written for professional people. It was written for people like mechanics, beauty parlor operators, carpenters, and housewives . . . because our laws are not in accord with our customs, we are a nation of sex offenders. We need laws that are more in keeping with the times we live in . . . I hope this book may enrich your life, as knowing my mother has enriched mine. During the time she wrote this book, I have come to know, understand, and admire her even more than I did before." (p. 11).

AUTHOR'S FRIENDS

Bill Patterson
Thorndyke Anthony, 3rd husband
Peter Landis
Jon and Vivian Merrick
Dr. Carl Adler
Ruth
Clint Jameson
Bill Canella, 1st husband
Sage, stepfather
Larry and Lorna Scott
Randall "Rock" Brown, 2nd husband
J. C. Smith, neighbor
Eric Summers, homosexual
Dan Jacobs
Laura Baxter, negro
Bill and Bobbie Sanford
Freddie Forman, lesbian
Donald James

Bill Iverson
Floyd Stewart
Al Sanislawski

Daughters

Tanette
Niki-Sue
Shari
Jana Kae

ABOUT THE AUTHOR.

By Rey Anthony, Tucson, Arizona, August 1, 1960.

Rey Anthony was born in a small town of east Texas, thirty-seven years ago. She finished high school at San Marcos Academy at fourteen, the youngest person to ever graduate from there. She attended the University of Houston for three years, majoring in mathematics, and interested in the social sciences (anthropology, psychology, and sociology.) She married the first time at age 17, and has been married and divorced three times in all. "I could be the woman next door to you, in a middle-class three-bedroom house." (p. 14) She is a P.T.A. member, operates a publishing and printing house, member of a national business woman's organization. "It is not for my own protection that I have chosen not to use my own name, but for the protection of my friends . . . the names have been changed to protect those who may be, or may seem to be, guilty in terms of current laws and/or moral codes." (p. 14) "Legality does not sanctify sex—any more than illegality makes sex filthy. . . . What may appear to be exceedingly promiscuous to one person might be the highly discriminating and therefore selective act of another person. . . .

Therefore, in the title of this book I have included the paradoxical concept of 'Selective promiscuity.'" (p. 15) Rey Anthony is the mother of five daughters.

PART 1 . . . Experiences. (p. 19)

Age 3 . . . Dallas (1926)

The author wants to know where babies come from . . . her mother says she will tell her when she is older. The kids in the neighborhood had a contest to see who could produce the most awful smell. . . . "The most disgusting thing I had ever smelled was my pussy. . . . When I peed my mother would say, 'Wipe yourself.' I wiped my fingers across my pussy and returned to the kids. We all produced our smells and I won. . . . There was a rumor among the kids that boys didn't have pussies . . . one afternoon a boy showed me his peter . . . we wee-weed on the floor of my playhouse. . . . My mother yanked the door of the playhouse open. . . . She hit me over and over." (p. 20)

Age 5 . . . Dallas (1928)

"My father died. I asked my mother why it couldn't have been her. I loved Daddy best." (p. 21)

Age 7 . . . Houston (1930)

"My grandfather pawed my pussy. Because of my great disgust for his ugly face, with the tobacco juice stringing from the corners of his mouth, I didn't look often. . . . It's not easy to stand with your legs apart, as though straddling an unseen object, so that an old man can explore your privates. . . . His searching fingers found the tiny opening and he managed to push one of them into it . . . with his other hand he was feeling the undeveloped titlets. . . . My grandmother would not

believe me when I told her about his feeling me. She said he was a man of God. 'He is a Baptist Minister. It is sinful of you to tell all those awful lies about this good man.'" (p. 22)

Age 8 . . . Houston (1931)

"Marjorie's mother worked. She was gone all day . . . Marjorie's brother, Bud had a cute little peter. It was a little larger around than a pencil. (p. 22) Bud liked our pussies, and we licked and sucked on his peter." (p. 23)

Age 9 . . . Houston (1932)

Pages 24 to 25 describe her technique of masturbating in the bathtub. "When I took a bath, I slid up and down in the bathtub on my back. Once, when the water was running, it splashed on my pussy. It felt so nice I kept on doing it . . . and reached such a peak, that it was almost unbearable, and suddenly my hole just jerked and jerked. . . . (p. 24) Running the water all over the pussy felt good, but running it on the little bump produced the feeling that finally caused the exciting and wonderful jerking. I got mamma's cold cream, and rubbed it on the bump. I could better control myself this way." (p. 25)

Age 10 . . . East Texas (1933)

"My cousin Sydney showed me how to fuck. I felt as if I were going to pee. I told him, and he said, 'Go ahead.'" (p. 26)

Age 13 . . . San Marcos (1936)

At the San Marcos Baptist Academy, the author's roommate Ruth, knew a good deal about life. "She had

already fucked, she said . . . in cars, and in swings, and on the ground sometimes. . . ." (p. 29) Pages 29 to 31 describe the author as she continues her practice of masturbating in the bathtub. "I continued playing with myself in the bathtub. . . . I also played with myself in bed. . . . I used cold cream to lubricate the little bump. . . . I was told that some of the girls played with one another. . . . I never got to know one well enough to have such an affair. . . . Obviously no one else could do this to my body as well as I could do it to myself." (p. 31) She is exposed to pornography at the Academy. She got her first accurate information about sexual intercourse from "The girl of the Golden West." (p. 32)

Age 14 . . . San Marcos (1937)

Pages 32 to 34 describe sex discussions by the house mother of San Marcos Academy. "The house mother explained in plain and simple terms, with a certain loveliness added, about sexual intercourse." (p. 32) "The boys were said to have sex with the cows that were kept for milking purposes. If caught, a boy would be expelled for this. None were caught." (p. 35)

Age 15 . . . Houston (1938)

"I was shocked at girls who let boys take sexual liberties. . . . The girl who lived behind us . . . allowed the whole winning football team of Jeff Davis High School to lay her on the football field. . . . I asked her, 'Wasn't it sloppy?' 'Oh, not so sloppy; I wiped off in between times.' ". . . The author says she wants to be a virgin when she marries. . . . "In spite of all my exploring and the fact that my cousin had had his peter in my pussy—I mean penis in my vagina—I still thought of

myself as a virgin. (p. 38) One of my best girl friends let her boy friend play with her titties. Breasts, that is. . . . My girl friend, after over a year of this fascinating play, still had small breasts and they didn't sag. . . . I went with one boy who was kissing me and had put his tongue in my mouth. . . . He put his hand on my stomach and moved it lower and lower . . . with all my clothes on and without consciously intending it to happen. I reached climax." (p. 40)

Age 16 . . . Houston (1939)

The author meets a young boy, Clint Jameson. "We spent literally hours kissing each other. . . . Pages 42 to 47 describe this affair in detail. "There were times when I would masturbate him with my hands. Other times he would kiss and suck on my clitoris. Now I put his penis in my mouth . . . even when I menstruated he kissed my genitals, and caressed, and sucked. . . . When we had intercourse we always used contraceptives." (p. 46)

Age 17 . . . Houston (1940)

Clint enlists in the Navy and came home on leave. . . . "He put his penis in my vagina and promised not to reach climax without first putting on a rubber. I couldn't face pregnancy alone." (P. 47.) He betrays her and fearing pregnancy after her menstrual period is a week late, she sees the family doctor. "Dr. Marsh examined me and it hurt. He mashed inside me and pulled and pushed. . . . I think you will menstruate in a couple of hours' " he said. (P. 49.) She tells Clint she is through with him.

Age 17 . . . Houston (1940)

On reaching simultaneous climax with a man she says, "I had never wanted to have a climax at the same time he did. . . . When we were having intercourse the sensations were pleasant, and I liked paying total attention to him and making him enjoy the climax he reached. . . . My girl friend Ruth told me, 'girls who jacked off before they started getting screwed sometimes didn't come from getting screwed. It seemed that they got to liking coming from jacking off and then weren't normal.' " (P. 51.)

Age 17 . . . Houston (1940)

She meets Bill Canella. Pages 51 to 53 describe her affair with Bill. "He kissed all of my body in the next few weeks and I kissed all of his. . . . He could make me reach climax by stroking the clitoris gently and kissing the nipple of one breast. . . . Bill could drape his long body around mine and have his penis inserted in my vagina at the same time." (P. 52.) They were married in November, 1941, and move in with her mother and her husband, Sage.

Age 18 . . . Houston (1941)

Her first daughter, Tanette, is born. Five days later she and Bill decide to have sex. "Tanette was lying in her bed, right by my bed. . . . When Tanette would squirm I had trouble keeping my mind on reaching a climax. . . . It was my first really unpleasant sexual experience. . . . Ruth's baby, Dana, "was ten months old when she was observed putting her hand inside her diaper and looking pleased. When the diaper was removed it could be seen that she was rubbing or stroking her clitoris. She was quite happy doing it." (P. 60.)

Age 19 . . . Houston (1942)

When the author's baby is six months old, she is pregnant again. . . . She separates from her husband . . . and has an abortion. (P. 64.) "The abortion was a horrible experience, not because it was an abortion, but the way it had been done." (P. 66.) Page 66 describes Rey having climax in the front seat of Bill's car after he returns to see her a week after she has had the abortion. "He fondled my 'Mons Veneris'. He stroked the sensitive skin at the top of my thighs, just on the outer edge of the large lips. He put his finger in my vagina and moved it in and out . . . sitting in the car I reached climax." (P. 66.) On the morning she is to go to court to get her divorce, Bill arrives and they go to bed. "I know we thought we were the only two people in the world ever to be getting a divorce and still having sex with each other." (P. 67.)

Age 20 . . . Houston (1943)

Rey gets a job at a shipyard. She meets Marie, a whore. "She was charming. She was one of the most completely gracious people I have ever known. 'When you have sex, my dear, do not do it in the back seat of cars. Do make sure you have the basic conveniences of life, such as a bed, hot running water, and towels,' she said." (p. 69)

Rey's foreman propositions her and she refuses him. The next afternoon he fires her. She thought, "You son of-a-bitch! Can't you get a woman in bed with you any other way?" (p. 70) Later she is rehired at the same shipyard, and in a medical examination she is told she has syphilis. She goes to another doctor who tells her it is "monilia albicans". (p. 73) He tells her it is

contagious like any other veneral disease, and tells her it serves her right for fooling around. She realizes she had first contracted this infection about four months after she began having sex with Bill Canella. She is finally cured of the disease by a woman doctor.

For several months she went without sexual relations with a man. "I had masturbated some, but not much." (p. 75) Wanting sexual relations with a man, she goes to bed "with a little fellow who didn't know I was there. He kissed me a couple of times and climbed onto my body. He just joggled and joggled, had an orgasm, and fell off. 'Go take a leak,' he said." (p. 75) She has much the same experience with another man. "The nearest anyone came to knowing I was a person and could feel thing too, was a fellow who asked, 'Dija come?' " (p. 75) One man who made her reach climax was unhappily married, "We had successful sexual relations but he was much too involved with his home life to get very involved with me." (p. 76) She goes to a tourist cabin with these various men. Pages 76 to 82 describe her affair with Larry Scott, a married man. "I showed him how he could lie beside me and insert his penis in my vagina. Then he could stroke the clitoris and manipulate the breasts as Bill had. . . . He was a really wonderful lover in no time at all." (p. 78) "His penis was smaller than Bill's and Clint's had been. So had the other men's been smaller . . . I thought: how unique that the first two penises I should come across should be larger than average." (p. 79) Larry's wife, Lorna, finds Rey's billfold on the front seat of his car. She goes to Rey's apartment and believes Rey when she denies she was with Larry. They become good friends, and Rey continues her affair with Larry. Lorna tells Rey how much their

sexual relations had improved. "She even confided to me about the new way they had intercourse—from the side, as she put it." (p. 82) Larry wanted to leave Lorna and his two sons to marry Rey, but he cared for Rey more than she cared for him. They finally stop seeing each other. "I had grown to care for another man who didn't care for me." (p. 82) "I felt the pain of loving this man and having him not care for me at all." During intercourse he said, "Move your tail." He snorts in disgust when she says she doesn't know how. (p. 82)

She meets Randall Brown, or Rock as she calls him, on a street corner while waiting for a bus. He walks her home, and they talk until five in the morning. He was in the Navy, and a likeable person.

Rey's stepfather, Sage, propositions her one day when her mother is out of town, but Rey refuses him. (p. 84)

Age 21 . . . Houston (1944)

Rey writes to Rock in the Navy. He asks her to marry him and she accepts. She writes him she has had sex before she married and was divorced, and "would never be true to any man . . . I wrote to him that not only did I do things like that, but I didn't think they were bad." (p. 85) "Mamma made some pictures of me in our back yard—with some black panties and a black bra on. They managed to look ladylike and sexy at the same time." (p. 85) She sends the pictures to Rock. When he comes home on leave, she gets a hotel room, but he tells her he wants to wait to have sex until after they are married. "The longer he stayed the more he decided it wouldn't be necessary to wait . . . He kissed me a couple of times, climbed on me, joggled a few minutes, and reached climax . . . he said it was good,

and went to sleep quickly, and I lay there wondering what was so good about it." (p. 86) They continue to have sex whenever he comes in on leave. She tells him she wants to have her "clitoris rubbed gently." Rock says it's not normal. "It makes me feel like I'm not a real man if I can't use my peter," he says. "You can use it, but for me, use your hand," Rey says. (p. 87)

Age 22 . . . San Francisco/Houston (1945)

Rey marries Rock, and after the first couple of weeks all of the novelty was gone. They argued, and it didn't take Rey long to realize she was getting sexual excitement out of the anger. They agreed not to have sex after they argued so they wouldn't get accustomed to a "pattern of messy fighting, making up, and screwing." (p. 88) Rey is expecting a baby.

Rock tells her when he had elephantiasis, the doctor gave him prostate massages. "The doctor would insert a finger in his rectum and move it back and forth, and though this would hurt unbearably, he would reach an orgasm." (p. 89) He felt this treatment had something to do with his lack of sexual desire.

They go to visit Rey's mother. Tanette asks what fucking is, and Rey tells her it is sexual intercourse. Tanette's grandmother finds her in a back bedroom with a little boy looking at each other's genitals, and she shouts at Tanette not to do anything like that again. (p. 91)

Bill Canella pays Rey a visit. He has remarried. and his wife is pregnant for a second time. He says he knows it can't be his child.

As Rock didn't want sex. when Rey went to bed she thought sex pictures. "I had dogs having sex with women, men having sex with horses, two men having

sex with me, some woman and man having sex and I would be one of them. (P. 94.) When Rock wasn't home I would sometimes go to bed and masturbate. But when he was home in bed with me I would make the pictures and have an orgasm." (P. 94.)

Rey takes castor oil and ten grains of quinine to induce labor of the expected baby. She insists Rock have sex with her when the labor pains start. Rock is reluctant but finally agrees. Page 96 describes them in bed. "Rock gently manipulated my clitoris. I reached a wonderful orgasm. . . . While I masturbated Rock, the pleasant sensations ebbed away and the pain of the labor contractions flowed in around me again." Her second daughter, Niki-Sue is born, and a few days later Bill Canella's baby is born. "It looks so much like him that it was unmistakably his child. "The woman always knows it's her child . . . but the man can only wait and hope—and sometimes never knows for sure." (P. 98.)

After Niki-Sue's birth, they move into a new house. Their neighbor, J. C. Smith, has an extraordinary "tool," Rock said he had an eleven inch penis. "Maybe it was even twelve inches; Rock had seen it when it was semi-erect, semi-flaccid, and wasn't at its best. Rock laughed and said that some fellows' peters never got any bigger even when they got hard." (P. 99.)

Rey is tired and ill, so she goes to a doctor telling him she has a sex problem. He advises her to, "masturbate. get another man, but take care of it. (P. 102.) I told him about the pictures—and the mental masturbation. That takes ability, he said. (P. 102.) Rey's sex problem still bothering her, she talks to Rock about it. telling him she prefers sex with him two or three times

a week instead of having to masturbate. Her mother and Rock convince her to go to another doctor. She does, and this doctor says, "There is just one thing I want to know: What are you doing here? Send your husband and your mother in. *They* need help." (P. 103.)

Age 23 . . . Houston (1946)

Rey goes to a motel with Larry Scott. Page 104 describes intercourse between them. "Once he got it (penis) inserted and said, 'Be still.' But even though I never moved once, he reached a climax right then." (P. 104.) She tells Rock about her sex with Larry. It upsets him, so she doesn't tell him about it again, and continues having sex with Larry. . . . Rey uses a diaphragm "with both Larry and Rock anytime I had intercourse." (P. 106.) She fails to one time with Rock and gets pregnant. . . . Their neighbor suggests a doctor that Rey can go to for an abortion. "He's the one that's been doing my mother's abortions for years." (P. 107.) Rey is really not sure if the baby is Rock's or Larry's child. She continues having sex with Larry. "Now the people at tourist cabins and motels do know what a man and woman are doing when they check in, remain a short while, and then leave. I wondered what they thought of a man checking in with a woman as pregnant as I was." (P. 108.)

When the baby (Shari) is born, it looks like Larry, and Rock says, "She's no Brown." Rey thinks, "What have I done? I am a bitch." (P. 109.)

Rock and I decided that he should have a vasectomy, so there would be no more pregnancies. She discontinues her relationship with Larry. Pages 112 to 114 describe Rey's ideas on having simultaneous climax

with Rock. "The precision of synchronously adjusting bodies to each other makes impossible the abandonment of the individual to the experience. . . . Simultaneous climax turned out to be another one of those fairy tales for the ignorant." (P. 113.)

Rey's friend Ruth, who was married with two children, went to a motel with a man who she worked with. "He sucked on her clitoris. And she had an orgasm for the first time." (P. 115.)

Rey and Rock move to North Carolina. They give up normal intercourse by mutual consent. She tells him how nice masturbating with a coke bottle can be. "I first heard of the suitability of coke bottles for female masturbation in the midst of a theological discussion with a Methodist Minister." (P. 117.)

Page 117 describes Rock using masturbation on Rey. "Rock put his thumb in my vagina, and by turning his hand so that part of it touched the clitoris, caused me to reach a climax by using a highly successful round-and-round and in-and-out movement." (P. 117.) They move back to Texas because they are so unhappy. Rock gets a job driving a taxi. They get along so poorly that Tanette prefers to live with her grandmother.

Age 27 . . . Houston (1950)

Rock goes to sea on a merchant ship. He tells Rey he has had sex with another woman, and describes how they do it with her on top. Rey wants to try it. "We did and it felt good." (P. 118.)

Rock runs into Eric Summers, who propositions him. Rock said he thought he would try it because Rey had told him to try different things sexually. "He said Eric had knelt on the floor by the bed and sucked on his penis until he—Rock—reached a climax." (P. 119.)

Age 28 . . . Houston (1951)

Rock has gone to sea, and Rey meets Dan Jacobs. "Dan said he thought sex should be performed between friends. He said he would only go to bed with a friend." (P. 119.) Pages 119 to 125 describe their sexual relationship. "I gave him information about how I liked the stimulation of the clitoris, and ultimately liked climax in that manner. . . . I was able to reach orgasms that were of beautiful intensity." (P. 120.) Dan doesn't like using his finger on her, he wants her to try "normal" intercourse. Rey liked scheduled sex, while Dan considered this "proposed scheduling about the most ridiculous thing he had ever come across . . . we had to have sex only without previous thought on the subject or it lost the beauty of spontaneousness. . . . Dan decided I was too much wear and tear on his nerves, and gave me up." (P. 123.)

Rock comes home. They move to a new apartment, and he gets a job driving a taxi. Rey becomes good friends with her negro neighbor, Laura Baxter. Laura gets annoyed with Rey because of her progressive ideas on teaching her daughters about sexual intercourse. Rey has told Tanette that pussycatting means intercourseing. Rey tells Laura, "I have no objection to your son's teaching my daughters about sexual intercourse—surely you have no objection when my daughters teach him some of the more accepted language on the subject." (P. 127.)

Rey moves to Dallas, taking Niki-Sue and Shari with her. She sells the Reader's Digest and makes good money. She meets Bill and Bobbie Sanford, who were hep, "cool cats." They teach her a whole new vocabulary. "I never found out what a penis was, but the female

sexual anatomy was summed up by the word, box." (P. 130.) She goes to a motel with Bill. "He was the craziest lover ever . . . he licked and sucked on my breasts, he nibbled at my clitoris. He sucked at the vaginal opening. The sensations were wild and wonderful, and I loved every one of them." (P. 131.) Page 131 describes them having intercourse.

Age 29 . . . Houston/Austin/San Antonio (1952)

Rock helps her in selling Reader's Digest, They hire a couple of people in San Antonio to help. Rey wants a divorce. She calls a lawyer. He tells her she should have no trouble getting one, telling her of a case where a woman wanted to have anal intercourse. "The judge saw her in his chambers, so she didn't have to bring out her sexual preference in court, and gave her a-divorce." (P. 133.)

Age 30 . . . Houston (1953)

Rey goes back to Houston, and Rock goes to Fort Worth. Page 134 describes Rey in a motel having intercourse with Bill Sanford.

Age 30 . . . Houston/Phoenix (1953)

They move to Phoenix, and Rock and Rey end their marriage. Rey says, "Rock you have tried to own my body. You couldn't do that—I own it . . . then you thought you could own me—and I just can't be owned. There's such a thing as dignity, and I have overlooked mine too long. You're leaving." (P. 136.) She divorces Rock, and continues her affair with Bill Sanford. Bill tells Rey his wife uses essence of peppermint for douching. Rey tries it, and Bill says, "You see, that makes your box very tasty." (P. 137.)

She meets Freddie Forman, a lesbian, where she works. Page 139 describes her lesbian affair with Freddie. "The kids would go in and go to bed. Freddie and I would neck. . . . She felt my breasts, and my vulva, but she was not very adept at this. I could compare her to a fumbling sixteen year old boy, easily. . . . My brief encounter with homosexuality didn't last long." (P. 139.) Rey works for Jon and Vivian Merrick. She continues her affair with Bill Sanford. "Bill introduced me to an exciting way to reach an orgasm. He would lick on my clitoris—suck on it—and put a finger into my vagina. . . . One time I was immersed in the sensations—my legs were apart and he was sucking on my clitoris—and he began to move the finger that he had had in my vagina . . . he approached the anus and began pushing his finger into it . . . when I reached climax this time it was even more intense. . . ." (P. 141.)

Age 31 . . . Phoenix (1954)

One month before her divorce is final, she meets Thorndyke Anthony. He offers her marriage. "I would have preferred simply living with Thorny instead of getting married this third time. However, marriage seemed to be the most intelligent thing to do when I considered the attitudes of the society I lived in." (P. 145.)

Thorny dislikes massaging her clitoris to have her reach climax. He asks her to try "normal" intercourse.

Bill Sanford visits her, and they "had a very nice sexual experience. He was still a competent lover." (P. 148.)

Thorny talks her into having normal intercourse, "He inserted his penis in my vagina. . . . I thought sex pictures. And I reached climax." (P. 149.)

Bill Sanford visits her again, and they have sex.

Rey finds she is pregnant, but she is not sure who the father is. She tells Thorny, and he says, "Any child you have will be our child." (P. 150.) Page 151 describes Rey reaching climax by wrapping her legs around Thorny's leg, and undulating her body until she reaches climax.

Tanette, 13 years old, has met a "charming fellow" of 17. He moves in to their apartment, and Rey approves of their, "pseudo-honeymoon-before-marriage relationship." (P. 153.) Tanette tires of him, and he leaves in dejection. His name was Donald James.

Thorny tells Rey she shouldn't make sex so important. Rey thinks: "I can always masturbate, I can cope with the situation myself." (P. 155.) They have sex after three weeks, and it was such an unpleasant experience that Rey felt, "sex is awful." (P. 156.)

Rick, a friend of Thorny, tells Rey and her daughters how his wife died trying to abort a baby of another man she had known. Rey tells Tanette, Niki-Sue, and Shari, "only with proper medical supervision could abortion ever be safe, and then it would be as safe as any other surgical operation." (P. 157.)

Age 32 . . . Houston/Tucson (1955)

Rey takes her daughters to Houston when she is eight months pregnant. She lets them watch while the doctor examines her. She wants them to be able to watch when she has the baby, but the doctor tells her this is not possible. Pages 161 to 162 describe the birth of Jana Kae, Rey's fourth daughter. There was a possibility Thorny was the father due to blood type. They all return to Tucson, but Rey knows the marriage won't succeed.

Age 33 . . . Tucson (1956)

Rey meets Bill Iverson. Pages 165 to 168 describe perversion and sexual intercourse between them. "Then he pulled my body to the edge of the bed. He sat on the floor and put his face between my legs—I felt his tongue on my clitoris. (Cunnilingus, p. 167.) Our intercourse was a lovely aftermath for me. . . . Bill and I made a very nice sexual relationship four ourselves." (P. 168.)

Age 34 . . . Tucson (1957)

Thorny goes away to school. Bill Iverson moves in with Rey and her four daughters. Pages 171 to 172 describe sex relations between Rey and Bill. "When I made love to Bill I kissed his body, fondled his testicles, kissed and sucked on his penis." (P. 171.) "When we had sex Bill masturbated me to a climax with his finger or his tongue." (P. 171.) Bill continues to have sex with other women with Rey's consent.

Pages 174 to 182 give Rey's theory on marriage. "I tend to be highly monogamous—with one person at a time—but not forever." (P. 180.)

Bill moves out when Rey leaves for Houston to meet Thorny. They have sexual intercourse once. After four months of sexual abstinence I suggested that we have sex. Thorny tells her she places too much importance on sex. "If you would spend more time on the more important things in life, we might be able to have sex once in a while." (P. 184.)

Tanette brings her boy friend Bill Patterson to the house, and he moves in. "We had our pseudo-honeymoon-before-marriage situation again." (P. 184.)

Not liking abstinence from sex relations, Rey goes to see Bill Iverson and has sex with him. She talks

to Thorny about trying to resume sex relations with him. He said he wasn't going to ever, and tells Rey he wants her to be a respectable mother to Jana. Rey says, "I will have sex. I will be in bed with a man." He accuses her of being promiscuous. She says, "If that's being promiscuous, then that's what I want to be." (P. 186.)

Tanette is sixteen now. She meets Floyd Stewart, who is 24 years old. She ends her relationship with Bill Patterson, and continues seeing Floyd.

Thorny leaves Rey after they divide their assets and liabilities. Months pass, and she builds up a printing business. "I wasn't involved in a goofed-up marital relation sans sexual sensations. I masturbated if I wanted to." (P. 189.)

Rock visits Rey. He visits with her daughters, and Rey goes to bed. "I woke up with Rock fondling my breasts. Twelve months of nearly complete sexual abstinence resulted in an immediate response on my part. . . . I had had five climaxes caused by someone else in the past year, and these five times had definitely not left me satiated. As Tanette, or anyone else who knew the facts would have put it, I was hard up. 'Just a minute,' I said. After all, Jana was lying on the other side of the bed I was on. I led him by the hand into the bedroom where he was staying that night. I got on the bed and we didn't say a word. We just made violent and passionate love. He did all the things that he knew I liked. It was extremely nice." (P. 190.) Rey asks him how sex is with his present wife, Stella, and he tells her "It's all right." (P. 190.)

Rey meets Dr. Carl Adler. Pages 188 to 210 describe their sexual relationship. "I had sex on several occasions

with another very nice man I knew, Al Sanislawski." (P. 201.)

Page 207 describes her feelings when Dr. Adler made love to her. "When he licked my clitoris, with fingers inserted in my vagina and anus, and I reached a climax. I would slide off the foot of the bed. . . . For me Dr. Adler was the man I had the most intense feeling for, so sexual relations with Rock and Al fell into the category of either 'gooder' or 'goodest.' Dr. Adler said our relations were the result of good clean lust." (P. 211.)

Tanette talks Rey into writing the book. Her daughters collate the book and put it between covers.

PART TWO. . . . Miscellaneous concepts.

A Penis by any other name . . .

"In short, one way sex is made 'filthy' as it is today, is by sheer neglect on the part of parents to provide a suitable vocabulary for things children must confront all through their lives . . . anus, vagina, penis, testicles, breasts . . . along with ears, eyes, nose, throat, legs, and brains." (P. 216.) "So long as we persist in not teaching our children authentic language at an age when they need it in order to integrate bodies and body actions into their everyday life, that long will we have 'obscenity.'" (P. 220.)

Obscenity is where you find it.

"There does not exist *anything* that is intrinsically obscene. For an individual to feel that an object or action is obscene, he must manufacture the idea of obscenity and apply it to the object of action." (P. 222.) "In some societies, women are completely unrestricted about sex and sexual matters, and the men are the same way. Obscenity takes over when possessiveness, jealousy, and hate take precedence over the more natural human emotions of friendliness and mutual respect. . . . For if you can accept a thing *for what it is* it ceases to be obscenity." (P. 222.)

Sexing for fun and profit.

"Finally, the usefulness of sexciting and sexotic pictures—the fantasizing—cannot be stressed too greatly in allowing the female to reach a climax of a wonderful nature and with great intensity." (P. 224.) . . . "let us develop the ability to create in our own minds the loveliness that can be had with good clean lust. This can be fun, and can be profitable in terms of better health and happier relations with our friends and acquaintances. Our sex life is not so separate from our life in general. The one does influence the other." (P. 225.)

"Normal" intercourse.

In actual order of importance for love making to the woman, the penis which is not easily manipulated, would have to rank third among the masculine extremities. . . . The tongue is second best. . . . The fingers are the most capable extremities in making love to a woman. (P. 226.)

Abortion.

"We are in need of more realistic attitudes regarding abortion. . . . When a woman finds herself pregnant, and in circumstances which make it impossible (emotionally) for her to bear a child, the resultant attitude can be insanity." (P. 228.)

Sex in language and action.

"We regard all practices other than 'normal' intercourse (coitus) as 'unnatural.' . . . Just a few words

that no one would want applied to himself are: promiscuous, wanton, lewd, lascivious, sensual, passionate, carnal, and lustful." (P. 232.) "Things of the spirit are created in the image of our God. Things of the spirit are created in the image of God, and things of the flesh but reflect the spirit. Of all Godlike qualities we are endowed with, the sexual capacity is one of the finest. Our sexual appetites are not of the devil, but are rather physical expression of spiritual qualities. . . . When the consciousness controls the body and creates sexual sensations, it is realizing and experiencing a very worthwhile—and spiritual—activity." (P. 233) "One fascinating aspect of sex in action is the fact that counselors and doctors now give advice that, if carried out, results in disregarding the criminal code." (P. 234.)

What price rebellion?

"There are some methodologies that would adjust all men to the world around them. . . . Dr. Robert Lindner, in his 'Prescription for Rebellion,' says that the average psychiatrist tries to 'adjust' his patients to *placid acceptance of a maladjusted society!*' (P. 238.)

"The way out and up in regard to our sexual problems in this country is by way of communication and education. Though speaking openly on sexual matters is a little rebellious, let us hope that more and more of us can acquire the willingness to confront our sexual activities. Only when we do this will we come out of our communicational and conversational dark age on sex." (P. 240.)

APPENDIX 5

COPY OF REPLY BRIEF OF AMICUS CURIAE CITIZENS FOR DECENT LITERATURE, INC., IN RALPH GINZBURG, ET AL. V. U.S., FILED IN SUPPORT OF RESPONDENT, UNITED STATES OF AMERICA, U.S. SUPREME COURT, OCTOBER TERM, 1965, NO. 42.

Reference: Brief Amicus Curiae Of James J. Clancy In ***Reno v. A.C.L.U., Et Al.***, U.S. Supreme Court No. 96-511 At **Page 4**

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC.,
EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

Reply Brief of Amicus Curiae Citizens for Decent Literateur, Inc., an Ohio Corporation, in Support of Respondent

CHARLES H. KEATING, JR.
3300 Carew Tower
Cincinnati, Ohio 45202

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California

Counsel for Amicus Curiae

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

Reply Brief of Amicus Curiae Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondent

---

I

The Government Did Not Concede That Any of the Works Had "Redeeming Social Importance"

Petitioners in their reply brief state:

> "The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society . . . "

We do not understand the respondent's position to be sussuscept of such a construction. There is no concession by the U. S. Government that any of the works have *redeeming social importance.*

The government's position,[1] simply stated, is that a work may have social importance by itself, and yet have "no value" (1) when used as a part of a larger whole, which is designed for a different purpose from that from which the "part" acquired its value, or (2) when used as a whole, but for a different purpose from that for which it had value.

In the view of amicus, that portion of Judge Body's opinion which discussed the obscenity of "Eros, Vol. 1, No. 4, 1962" correctly and adequately sets forth the first proposition and hardly requires elaboration. However, this theorem can, perhaps, be more effectively demonstrated by a more isolated example. Suppose the etching on page 11 of Eros, depicting the biblical story of the incestuous act committed by Ammon on his sister Tamar, to be incorporated into and made an illustrated part of the cheap paperback book "Strange Bondage," (W-18)[2] published by Foremost Publishers, 65 Cadillac Square, Detroit, Michigan, and distributed nationally by World Wide News Company of Cleveland, Ohio. Certainly the art value of such an etching in an art gallery to a sophisticated art audience cannot be transferred so that it constitutes "value" to save a paperback which is designed for a different purpose, i.e.,

[1] Also the position of amicus and the trial and appellate courts. The trial and appellate courts did not find it necessary to discuss the second proposition, having agreed that the Housewife's Handbook on Selective Promiscuity was not a bona fide case history.

[2] "Strange Bondage" opens with an incestuous scene between brother and sister which is interrupted by an unexpected return of the parents. Thereafter brother and sister go their separate ways through sex orgy after sex orgy until they return to each others embrace in the final chapter to complete their act of incest.

whose predominant appeal is to prurient interest. If anything, it has a *negative value,* because under the circumstances it contributes, though in the smallest degree, to the predominantly prurient appeal of the paperback text.

The mere fact that Eros contains a number of such etchings, or the like, would not take it out of the "de minimis exclusion" which Petitioners are willing to admit to.[3] Far from it. Each etching contributes a pictorial representation which lends itself to and reinforces the predominant prurient theme. Judge Body explained this in his opinion, where he said concerning other portions of Eros:[4]

> "This does not mean that the articles have no effect upon the finding of obscenity with regard to the periodical as a whole. Here is a pattern. Here is a craftily compiled overall effect . . . "

The second theorem acknowledges that a work may have social importance under a special set of circumstances, but "no value" when used for a different purpose from that for which it had value. Were the Housewife's Handbook a true case history it might be said to have value for a limited audience of professional people who have a legitimate interest in such case histories. As noted in footnote 1 however, the trial[5] and appellate courts did not consider this aspect, having rejected the factual premise upon which petitioners' defense is based, i.e., that the book was an authentic case history. The government does not "seek(s) to sustain conviction on the Handbook counts by adding a

[3] Petitioners' Reply Brief page 2, footnote 1.

[4] United States v. Ralph Ginzburg et al, 224 F. Supp. 129, 134.

[5] It bears emphasis that the trial court disbelieved the "accuracy of this book" and found it constituted "bizarre exaggeration." The author testified before Judge Body and, as a trier of fact, the trial judge had every right to pass on the matter of her credibility.

new qualification" as claimed by Petitioners.[6] On the contrary, before the government is forced to reply to that theorem, this Court must first reject the above fact findings of the trial judge, a hurdle in Petitioners' path not easily overcome.[7]

Assuming that the state of the argument does place the government in a position where it is necessary to reply, as were this Court to reject the trial judge's factual determination as to the nature of the book, still the Petitioners are not able to avail themselves of the defense. 18 USCA 1461 is a criminal statute calling for the government to prove that the defendant has knowingly mailed subject matter, the predominant appeal of which is to the prurient interest of an average person of normal sexual impulses.[8] All that the government need prove is that the defendant by his conduct abused a conditional privilege.[9] A special audience is a matter of defense in the nature of justification, which the defendant failed to place in issue at the trial. Similarly the matter of a special audience is a part of the government's case in chief, where the people wish to rely

---

[6] Petitioners' Reply Brief, page 4.

[7] Amicus submits that the 24 page book outline of the Handbook, in the appendix of its amicus brief, is autoptical proof in capsule form in support of the trial judge's findings that he disbelieved the "accuracy" and found it constituted "bizarre exaggeration" and hard-core pornography. A central theme arrived at through an outlining process should be of as much assistance to this Court as Petitioners' conclusionary argument that: "As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist . . ." (See Petitioners' Reply Brief, page 5)

[8] *Grove Press Inc.* v. *Christenberry*, DCNY 1959, 175 F. Supp. 488, 499.

[9] *U. S.* v. *Rebhuhn*, 109 F. 2 512, 514, cert. denied 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629.

on a test other than the "Roth" average person test. *U. S.* v. *Levine*, 83 F. 2 156, 158.

The *Roth* (*supra*), *Levine* (*supra*) and *Rebhuhn* (*supra*) cases are authorities against the Petitioners' statement[10] that 18 U.S.C. 1461 is not a statute which makes the redeeming importance of a work turn upon the professional or educational level of its audience. See also amicus brief at pp. 68-72, discussing the variable nature of obscenity. Social importance is not determined in a vacuum.

II

The Concept of "Obscenity" Under 18 USC 1461 Includes the Sexually "Vulgar and Filthy"

Petitioners' reply that the concept of obscenity under 18 U.S.C. Section 1461 does not include the sexually "vulgar and filthy" as asserted by the government in its brief (Res. Br. 14, 29-30) is not supported by their authority, *Swearingen* v. *U. S.* *Swearingen* simply held that the language specifically set forth in the footnote of that case, which the court termed "exceedingly coarse and vulgar", did not have in it the lewd, lascivious and obscene tendency and the sexual impurity proscribed by the statute. There is no similarity between the Swearingen language noted in the footnote and that which is involved in this case.

The Court in *Swearingen* noted at page 451 that the word "obscene" had the same meaning as that term used in "obscene libel" in the Common Law. In *Roth* at footnote 20 this Court noted:

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I. Model Penal Code . . . "

Since the word "obscene" as used in Section 1461 has the same meaning as the word "obscene" as used in the Com-

---

[10] Petitioners' Reply Brief, page 4.

mon Law Cases, and since the Common Law definition of "obscene" is the same as that stated in the A.L.I. Model Penal Code, then it would appear that the government is correct in its assertion. See, in particular, Respondent's Brief, page 15, footnote 3.

III

Constitutional Review Is Limited to the Determination Whether the Social Importance of the Conduct or Subject Matter Is Sufficient to Take the Case Out of the Realm of a Jury Issue

The Petitioners' Reply Brief takes issue with the alternative suggested by the government in its brief as to the manner of this Court's review:

> "While we thus acknowledge that it would not be inappropriate in this case, in light of the ultimate constitutional nature of the issues of characterization involved, for the Court to undertake an independent evaluation of each of the factors under the Roth test as to each of the publications in issue, we note alternatively that the Court could limit its plenary review of the materials to the question of their redeeming importance, leaving the questions of pruriency and offensiveness to the reasonable judgment of the courts below . . . "

In this connection, amicus finds itself at slight variance with the government's arguments. We submit that this Court's review is limited to the alternative stated, i.e., the sole question is whether the social importance of the conduct or subject matter is sufficient to take the case out of the realm of a jury issue. The historical role of a reviewing court in this area has heretofore been limited to a determination as to whether a jury issue has been presented. The fine line between "candor" and "shame" has always been a jury matter. *U. S.* v. *Kennerley*, 209 Fed. 119, 120; *U. S.* v. *Levine*, 83 F. 2 156, 157; *Roth* v. *U. S.*, 354 U.S. 476 at 490; *Kingsley Book Inc.* v. *Brown*, 354 U.S. 436 (Justice

Brennan, dissenting). We believe that this Court has, in fact, been following the mode of review noted, that is, limiting its plenary review of the case to the question of the redeeming importance of the conduct and subject matter involved. See Brief Amicus Curiae, pp. 46-51, 59.

Respectfully submitted,

CHARLES H. KEATING, JR.
JAMES J. CLANCY